Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1625

IMAGE CARRIER CORPORATION, HOUSE OF LITHOGRAPHY, INC., ASSOCIATED LITHO AND LETTERING SERVICE, INC.,

Petitioners,

v.

EDWARD I. KOCH, MAYOR OF NEW YORK CITY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IMAGE CARRIER CORPORATION,
HOUSE OF LITHOGRAPHY, INC.,
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Petitioners,

v.

EDWARD I. KOCH,
MAYOR OF NEW YORK CITY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

THE OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is officially reported at 567 F.2d 1197 and appears in the Appendix hereto (2a-17a). It reversed the decision of the

United States District Court for the Southern District of New York (MacMahon, J.), reported at 430 F. Supp. 579 which held that the Respondents'[1] restrictive bidding and contracting practices, requiring that certain of Respondents' printing work be required to display the union label, were arbitrary and irrational, not reasonably related to any legitimate governmental purpose and therefore violative of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.[2]

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 30, 1977. A timely Petition for Rehearing with a suggestion for a hearing en banc was denied by the Second Circuit on February 16, 1978, and this Petition for Certiorari was filed within ninety days of that date.[3] This Court's jurisdiction is invoked under 62 Stat. 928, 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a municipality may arbitrarily preclude non-union printers from bidding on and being awarded city printing contracts financed by taxpayer monies solely because of their status as non-union printers?

2. Whether Congress, in establishing a national labor policy protecting an employee's right to accept or reject

[1] This action was originally brought against Abraham D. Beame in his capacity as Mayor of the City of New York, City administrative agencies and various individual members of these agencies. See pages 34a-36a herein for a complete list of original Respondents and those individuals currently holding positions held by the original individual Respondents.

[2] See pages 18a-30a for the opinion on the District Court.

[3] See page 1a herein for Order of Second Circuit denying Petitioners' Petition for Rehearing.

union representation, intended that a municipality be permitted to promulgate a policy, the effect of which is to force employees to affiliate with a labor organization in order for their employer to be awarded certain municipally funded contracts?

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause, 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The pertinent federal labor policy is embodied in the National Labor Relations Act, *as amended* (hereinafter "NLRA",) 29 U.S.C. §§141 et seq. and is described at pages 12-15, *infra*.

MAYORAL EXECUTIVE ORDER INVOLVED

In relevant part, Mayor LaGuardia's 1934 Executive Order provides:[4]

> Resolved, that in order to lend the greatest measure of aid and assistance during the present economic depression to those citizens of our City engaged in the various branches of the printing industry, the following provisions be made a part of each and every contract and open market order issued by the Board of City Record;

To this end, the Order goes on to state:

> 1. That all printed forms hereafter purchased for the use of the City of New York by the Board of City Record shall bear the label of the Allied Printing Trades Council of the City of New York. This rule shall not apply to letterheads and envelopes.
>
> 2. That all bidders be required to certify they operate a union plant and pay the prevailing rate of wages in all divisions of their establishment. . .

STATEMENT OF THE CASE

A. The Proceedings Below

This action was commenced on July 24, 1974, in the United States District Court for the Southern District of New York. Invoking the jurisdiction of the court pursuant to 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3), the Petitioners sought declaratory and injunctive relief pursuant to 28 U.S.C. 2201 against Respon-

[4] The full text of the Executive Order appears at pages 32a-33a herein.

dents' practice of restricting bidding upon, and awarding printing contracts to, only those printing establishments whose employees were represented by labor organizations and entitled to exhibit the union label.

As grounds for such relief, the Petitioners alleged that the restrictive practices deprived them of opportunities to bid upon and be awarded City financed contracts in violation of rights guaranteed them by the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. Further, the Petitioners alleged that the Respondents' restrictive bidding and contract awarding practices infringed upon the rights guaranteed employees under 29 U.S.C. §157, i.e. the right to reject labor union representation.

A non-jury trial was held on December 6, 1976 before Judge MacMahon. In his decision filed April 8, 1977, Judge MacMahon found that the Respondents' policy and practice of bidding upon and awarding printing contracts only to those printers whose employees are represented by labor unions and who exhibit a union label, violated the equal protection clause of the Fourteenth Amendment. On April 20, 1977, Judge MacMahon filed an order and judgment in which he stayed enforcement of his order pending Respondents' appeal to the United States Court of Appeals for the Second Circuit.

Timely notices of appeal to the Second Circuit were filed by the Respondents and on December 30, 1977, a panel of the Second Circuit (in a split decision per Judge Oakes), reversed the lower court decision of Judge MacMahon on the merits. Circuit Judge Anderson filed a concurring and dissenting opinion in which he contended that the decision of the District Court should be upheld.

Petitioners' timely motion for rehearing with a suggestion for a rehearing en banc was denied February 16, 1978.

B. The Facts

On April 12, 1934, the City of New York, pursuant to Executive Order of Mayor LaGuardia, adopted a policy restricting the awarding of all city printing contracts, except for the printing of letterhead and envelopes, to those private printing establishments whose employees were represented by a labor organization and etitled to display the union label.

Pursuant to this Mayoral Order, printing contracts awarded by the City subsequent to the effective date of the Order (April 20, 1934), have been restricted exclusively to printing establishments which are authorized to display the union label on their printed material. Implementing this 44-year-old procurement policy, the Respondent city agencies have included in their bid solicitations the specific requirement that work must be performed in a unionized facility and that such work, with the exception of letterheads, and envelopes, must bear the union label.

The ramifications of Respondent's restrictive bidding and contracting policy was clearly described in the court below. In a city where the increasing majority of printing establishments are non-union (350 non-union establishments, 250 union establishments), the policy contained in the 1934 Mayoral Order has had the effect of, ipso facto, foreclosing all non-union printing establishments from bidding upon and being awarded most city printing contracts. This exclusionary policy disqualifies all non-union printing companies from performing city work, notwithstanding the fact that the majority of those non-union companies, including the three named Petitioners herein, are fully qualified to perform the types of printing for which the city normally contracts. In fact, each of the Petitioners have

performed work similar to that required by New York City for both private and public sector clients.[5]

The District Court below held that Respondents' restrictive bidding and contracting practices were arbitrary and irrational and not reasonably related to any legitimate governmental purpose. In so holding, the court rejected Respondents' assertions that the restrictive bidding policy served to effectuate New York law requiring the payment of prevailing wage rates to workers under public contract; to further the City's interests in obtaining work of good quality; and to facilitate the policy of enforcing printers claims for overtime wages. Accordingly, the court concluded that the Respondents' policy of restricting the bidding upon and awarding of printing contracts to those printing establishments whose employees are represented by labor organizations and who may exhibit the union label, violated the equal protection clause of the Fourteenth Amendment.

In its decision per Judge Oakes, the Majority of the Panel of the Second Circuit reversed the District Court's decision, holding that the Respondents' restrictive bidding and contracting practices rationally promoted the City's interest in

[5] As a general rule, the type of printing work awarded by the Respondent agencies is uncomplicated. The testimony of Mr. Ed. Blank, Director of Printing Management of Printing Industries of Metropolitan New York (a trade association composed of both union and non-union printers), disclosed that most of the printing work awarded is generally one sheet work or booklets that can be done on the simplest and smallest type of printing equipment. According to Mr. Blank, the fact that one employer is unionized and another is not, had no bearing on the type or quality of work likely to be performed. Mr. Blank further observed that in order to assure high levels of quality and employee productivity, both union and non-union printers must have good management, up-to-date technology and well-trained employees, and that the question of union or non-union status played no part in the achievement of these goals.

fostering and promoting collective bargaining. Having discovered what it deemed a legitimate state interest behind the City's policies, the Panel concluded that, although the Mayoral Order may now be outdated, any re-evaluation of the Order should be achieved through legislative rather than judicial action.

Circuit Judge Anderson filed a strongly-worded concurring and dissenting opinion in which he concluded that the Panel Majority erred in reversing the judgment of the lower court on the merits. As viewed by Judge Anderson, the Majority's acceptance of the "foster collective bargaining" justification (an argument first raised by the Respondents during oral argument) was totally inappropriate since at no time, either before or during the District Court proceeding, did the Respondents advance such a justification. Further, Judge Anderson argued that the record below contained no evidence which would support a conclusion that the challenged restrictive bidding and contracting practices do, in fact, foster collective bargaining. As such, Judge Anderson concluded that, in the absence of proof supporting this conclusion, the Majority's adoption of Respondents' eleventh hour justification for their restrictive bidding and contracting policies was totally unwarranted.

THE REASONS FOR GRANTING A WRIT

The significance of this case not only to non-union printing companies and their employees, but to all non-union private sector employers and their employees cannot be too strongly stated.

The sole question herein presented is the legality of a municipal contracting policy which openly and admittedly discriminates against non-union printing establishments. This policy deprives non-union printing employers and their employees of the opportunity to bid upon and perform

private printing contracts financed by New York City taxpayers solely because of their non-union status—thus penalizing those employees who have mutually agreed to conduct their employment relationship in a non-union environment. This exclusion of open shop printing companies from eligibility to bid upon and be awarded public contracts, financed through public funds and issued by a tax-supported governmental body, raises basic and fundamental questions which require the attention of this court.

The Second Circuit's decision, upholding the constitutionality of the 1934 Mayoral Order and the contracting practices initiated pursuant thereto, calls into question the continuing viability of the numerous decisions of this Court which hold that governmental police power measures which are arbitrary and irrational and not reasonably related to any legitimate governmental purpose are to be struck down as repugnant to the Fourteenth Amendment of the United States Constitution. Moreover, the decision below is in direct conflict with this Court's decisions defining the scope and force of the labor law preemption doctrine and, as such, raises similar questions to those raised in the Second Circuit's decision in *New York Telephone Company, et al. v. New York State Department of Labor, et al.*, ____ F.2d ____, 96 LRRM 2921, which was recently granted review by this Court, U.S. Sup. Ct. No. 77-961.

1. The Decision Below Conflicts With This Court's Decisions Delimiting The Basis Upon Which a Local Municipality May Exercise Its Police Power.

In its decision below, the District Court found that Respondents' policy of rejecting bids on public printing contracts solely on the basis of the non-union status of the bidder was patently arbitrary and irrational and, consequently, in violation of Petitioners' rights as guaranteed by the Four-

teenth Amendment. In holding Respondents' restrictive contracting policies unconstitutional, Judge MacMahon placed his reasoning squarely in line with the body of law which holds that where a local government exercises its police power in such a way as to construct classifications of persons, such classifications must be reasonable, not arbitrary, and have a fair and substantial relation to a legitimate government objective. *Royster Guano Company v. Virginia*, 253 U.S. 412; *Reed v. Reed*, 404 U.S. 71; *Eisenstadt v. Baird*, 405 U.S. 438.

In his decision below, Judge MacMahon correctly applied the rational basis test. Judge MacMahon had before him ample evidence upon which to justifiably conclude that Respondents' union label policy was violative of the equal protection clause. The record is replete with testimony which establishes the irrationality of Respondents' restrictive bidding policy. The record also clearly supports the finding that the Petitioners have the capabilities to perform, and do, in fact, perform the type of printing jobs which the City presently restricts to only unionized printers.

At the trial, the Respondents were given every opportunity to show how the challenged restrictive bidding and contracting practices in any way furthered a legitimate state interest. Such a showing was not and could not be made. Since Respondents failed in their efforts to show how the restrictive bidding and contracting practices furthered some identifiable state purpose, the District Court was correct in finding such practices to be violative of the Fourteenth Amendment.

In reversing the District Court's decision on the merits, the Second Circuit rejected findings which were totally supported by the record and substituted a finding that the purpose of the Mayoral Order was "to foster collective bargaining." Such an imputation of purpose by the Second Circuit finds no support in the record.

In his concurring and dissenting opinion, Judge Anderson correctly identified the fallacy of the Majority's efforts to substitute purposes other than the explicit purpose set forth in the Order itself. In this regard, Judge Anderson stated:

> The preamble of the Executive Order of April 12, 1934, simply states: 'RESOLVED, that in order to lend the greatest measure of aid and assistance during the present economic depression to those citizens of our City engaged in the various branches of the printing industry, the following provision be made a part of each and every contract and open market order issued by the Board of City Record.' . . . No more expansive legislative history accompanies the resolution; no further explanations of its purposes were offered when subsequent administrations made executive decisions to continue the restrictive practice; and no mention of a desire to promote collective bargaining was ever made in connection with this 'union shop only' policy. (14a-15a)

When local economic regulations are challenged as violating the Equal Protection Clause, this Court has deferred to legislative determinations concerning the desirability of particular statutory distinctions, provided that the challenged classification is rationally related to a legitimate state interest. *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Dandrige v. Williams*, 397 U.S. 471 (1970). In this case, however, Respondents failed to show that the City's ban on the use of non-union labor in performing certain public printing contracts had any bearing upon the state's interest in collective bargaining, the payment of the prevailing wage rate or the City's interest in obtaining high quality workmanship. Indeed, even if there were Executive history to support the "foster collective

bargaining" rationale, such Executive intent, if interpreted to absolutely bar a non-union employer's participation in the competitive bidding process, would certainly run afoul of the Fourteenth Amendment.

Conflicting as this case does with numerous other decisions of this Court concerning a municipality's use of its police power, this case presents compelling issues which should be addressed by this court.

2. The Decision Below Raises Important Questions Of Federal Law Which Have Not Been, But Should Be Settled, Concerning The Application Of This Court's Labor Law Pre-emption Doctrine To Municipal Enactments Which Exclude Non-Union Business Establishments From Performing Municipaily-Financed Contracts Soley Because Of Their Status As Non-Union Employers.

This case presents the opportunity for this court to address the specific issue of whether a municipality or a municipal agency may, through the exercise of its police power, infringe upon the federally protected right of an employer and his employees to establish or refrain from establishing a collective bargaining relationship. In the instant case, the City of New York has intruded on the exercise of this right by depriving those employers and employees who maintain a non-union labor relationship from the opportunity to bid upon and receive printing contracts sponsored by New York City. The right of a municipality to penalize employers and employees who have exercised this federally protected right to maintain a non-union relationship has not been previously presented to this Court.

The facts in this case clearly establish that the direct result of Respondents' restrictive contracting policies is to require an employer and his employees to adopt a collective bargaining relationship if they wish to perform Respondents' printing. Failure to adopt such a relationship bars

both the employer and his employees from the opportunity to furnish such work to the City. Furthermore, Respondents' restrictive contracting practices provide a substantial impediment to unionized employees in the exercise of their federally protected right to decertify a labor organization as their bargaining representative. Obviously, employee awareness that a decertification of their union would mean loss of City printing work and lost earnings opportunity provides a significant deterrent to the commencement of any decertification effort — a right fully protected by the National Labor Relations Act.

3. The Decision by the Second Circuit Is In Conflict with Applicable Decisions of This Court And Subverts the Established Principles Underlying The Federal Labor Law Pre-emption Doctrine.

In its opinion, the Court below dismissed the Petitioners' allegation that Respondent's restrictive contracting practices arising out of the 1934 Mayoral Order are pre-empted by Section 7 of the National Labor Relations Act. In this regard, the Court below states:

> We do not believe that Section 7 of the NLRA pre-empts and thereby invalidates the City's resolution under the supremacy clause of the Constitution. Section 7 gives employees the right not to join a union under certain circumstances. Neither the City's resolution nor its policy memoranda in bidding instructions implementing the resolution requires any employee to join a union. Rather, the City's policy merely prefers union shops to non-union shops in awarding flat form printing contract . . . (10a)

The only precedent cited by the court for reaching this conclusion is the Second Circuit's own decision in *New York Telephone Co. et al. v. New York State Department of*

Labor, et al., supra. Ironically, this case, which involves issues similar to those raised herein, was recently granted certiorari by this Court, U.S. Sup. Ct. No. 77-961.

It is respectfully submitted that the 1934 Mayoral Order (and Respondents' implementation thereof) interferes with the Federal regulatory scheme established by Congress. It is conceded by the Respondents that the award of most City printing contracts is restricted to only those companies who are authorized to affix the union label. Therefore, Petitioners and their employees are forced to submit to unionization, to the deprivation of their employees federally protected Section 7 rights, if they desire to obtain the economic benefits of being able to perform City printing contracts. Under the Second Circuit's ruling, the only way that non-union printers may perform City printing work is by becoming a unionized employer. However, Federal law prohibits an employer from unilaterally taking such action unless a majority of its employees elect to be represented by a labor organization.

The pre-emption doctrine, as enunciated by this Court, is designed to avoid competing regulations of labor relations matters by state and local governmental bodies which undermine the policies embodied in federal labor laws. Indeed, in order to promote a "comprehensive national labor law", this court has consistently declared invalid any state regulatory scheme found to impair rights created by the National Labor Relations Act. See *Hill v. Florida*, 325 U.S. 538 (1945); *Auto Workers v. O'Brien*, 339 U.S. 454; cf. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). See also, *Cox, Labor Law Pre-emptions Revisited*, 85 Har. L. Rev. 1337 (1972).

With the adoption of the National Labor Relations Act, Congress regulated and occupied the substantive area of labor relations "to the full extent of its constitutional power under the Commerce clause". *Amalgamated Ass'n. of St. Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Rel. Bd.*, 340 U.S. 383, 391 (1951). As such, the Federal labor policy set forth in the National Labor Relations Act pre-empts and voids any governmental actions which have a tendency to frustrate the operation of the Federal scheme; *Nash v. Florida Indus. Commn.*, 389 U.S. 235 (1967) or which create a substantial risk of conflict with policies central to the Federal Labor Law. *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). In the instant case, New York City's action clearly frustrates the exercise of federally guaranteed employee rights and directly conflicts with federal labor law policy protecting the right of employers and employees to establish and maintain a non-union employment relationship.

Exceptions to the pre-emption doctrine have been countenanced in only the most limited of circumstances.[6] Since none of these circumstances have any application to the instant case, the Respondents' restrictive practices should be found to be pre-empted.

---

[6] Where the activity regulated by the State was merely a peripheral concern of the Federal labor law (*San Diego Bldg. Trades Council v. Garmon, supra; Lodge 76, IAM v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); where such local governmental activity touch interests so deeply rooted in local feeling and responsibility that . . . (a court) cannot infer that Congress had deprived the states of the power to act (id.); where Congress has affirmatively indicated that the States have the power to act (*Amalgamated Ass'n. of St. Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971)).

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Dated: May 15, 1978
Washington, D.C.

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, and for the Second Circuit, held at the United States Court House in the City of New York, on the fifteenth day of February, one thousand nine hundred and seventy-eight.

. x

Image Carrier Corporation,
Plaintiff-Appellee,

v.

Abraham D. Beame, Mayor of New York City, et al.,
Defendants-Appellants.

. 77-7205

House of Lithography, Inc., et al.,
Plaintiffs-Appellees,

v.

Abraham D. Beame, Mayor of New York City, et al.,
Defendants-Appellants

. x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

[Filed Feb. 16, 1978]

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 79, 80, 82—September Term, 1977.

(Argued September 20, 1977 Decided December 30, 1977.)

Docket Nos. 77-7205, -7206, -7224

IMAGE CARRIER CORPORATION,

Appellee.

v.

ABRAHAM D. BEAME, Mayor of New York City, et al.,

Appellants.

THE HOUSE OF LITHOGRAPHY, INC., et al.,

Appellees,

v.

ABRAHAM D. BEAME, Mayor of New York City, et al.,

Appellants.

Before:

SMITH, ANDERSON and OAKES,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, holding unconstitutional New York City union and union-label bidding requirements for flat-form printers, as a denial of equal protection to nonunion

printers. The district court's conclusions on abstention, standing, ripeness and federal preemption are upheld.

The judgment on the merits is reversed.

CAROLYN E. DEMAREST, Assistant Corporation Counsel, City of New York (Bernard Richland, Corporation Counsel, City of New York), *for Appellant New York.*

FRANCIS T. COLEMAN, Washington, D.C. (Donald L. Rosenthal, Washington, D.C., Townley & Updike, New York, N.Y., of counsel), *for Appellee.*

NORMAN ROTHFELD, New York, N.Y., *for Intervenor-Appellant.*

OAKES, *Circuit Judge:*

This appeal raises the specter of *Lochner* v. *New York*, 198 U.S. 45 (1905), which, with the possible exception of *Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857) (the Dred Scott case), remains the most discredited of Supreme Court decisions. We reject the attempt to resurrect this apparition of the past.

At issue below,[1] as well as on this appeal, is a policy of the City of New York (City) whereby only printers employing union labor and exhibiting the union label are permitted to bid for the City's "flat-form printing" business.[2]

1 The federal claims were presented pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3). Declaratory relief was sought under 28 U.S.C. § 2201, as was injunctive relief.

2 "Flatbed printing," another term for flat-form printing, utilizes "a printing press in which a flat bed holding the printing form moves against a revolving cylinder which carries the paper." The Random House Dictionary of the English Language (1966).

Utilizing traditional equal protection analysis, thereby avoiding the substantive due process issue raised by appellees, the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, found the City's practice "irrational" and hence unconstitutional.[3] We reverse the district judge's equal protection holding and find no violation of appellees' due process rights. However, we agree with the district judge that this case is not appropriate for abstention, that appellees have standing to raise their constitutional claims and that Section 7 of the National Labor Relations Act (NLRA)[4] does not preempt the City's practice of favoring union printers.

I

Facts

Appellees, plaintiffs in the district court, are non-union printers. Appellants, defendants below, are City officials who enforce the practice of restrictive bidding on flat-form printing contracts. The Allied Printing Trades Council of Greater New York, an umbrella organization of printing unions, has participated in these proceedings as intervenor.

The controversy arises over a Resolution (Resolution) adopted April 12, 1934, by the New York Board of City

3 The opinion below is reported at 430 F. Supp. 579 (S.D.N.Y. 1977).

4 Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Record[5] requiring bidders for flat-form work to operate a union plant and to pay the "prevailing rate of wages."[6] In addition, the forms printed for the City must bear the union label. These requirements are followed by the Department of Purchase,[7] the Board of Education[8] and the

5 The Resolution, signed by Mayor LaGuardia and the then City Comptroller and Corporation Counsel, provides in pertinent part:

> 1. That all printed forms hereafter purchased for the use of the City of New York by the Board of City Record shall bear the label of the Allied Printing Trades Council of the City of New York. This rule shall not apply to letterheads and envelopes.
>
> 2. That all bidders be required to certify they operate a union plant and pay the prevailing rate of wages in all divisions of their establishment.

6 This rate is determined in accordance with state law. N.Y. Labor Law § 220(5)(a) (McKinney Supp. 1976) states:

> The "prevailing rate of wage," for the intents and purposes of this article, shall be the rate of wage paid in the locality as hereinafter defined to the majority of workmen, laborers or mechanics in the same trade or occupation at the time the work is performed. In the event that it be determined that there is not a majority in the same trade or occupation paid at the same rate, then the rate paid to the greater number in such trade or occupation shall be the prevailing rate, provided such greater number constitutes at least forty per centum of the laborers, workmen or mechanics engaged in such trade or occupation; in the event there is less than forty per centum of the laborers, workmen or mechanics engaged in the same trade or occupation in the same locality paid the same rate, then the average paid to such laborers, workmen or mechanics in the same trade or occupation shall be the prevailing rate. Laborers, workmen or mechanics for whom a prevailing rate of wage is to be determined shall not be considered in determining such prevailing wage.

7 The Department's Supplement to Standard Instructions to Bidders states:

> Unless otherwise specified in the schedule, all work must be done in a union printing plant located within the City of New York. The union label must appear on all printing except letterheads, noteheads and any other printing excepted in the schedule.

8 The Board's Bid Invitation for Jobs of $5,000 or Less includes the language:

> Unless otherwise specified, all printing required by this contract except envelopes, must be done in a printing plant located within

Health and Hospitals Corporation.[8] We need not question the district court's factual findings that printing quality is not a function of union status[10] and that the 350 nonunion shops in New York, as compared to the 250 union shops, come closer to paying the required prevailing wage rate,[11] because we believe that a rational basis for the City's policy exists.

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the City of New York. The union label must appear on all of the forms, required under this contract, except letterheads, noteheads and envelopes.

9 A December 3, 1971, memorandum of the Health and Hospitals Corporation provides:

> [T]he Health and Hospitals Corporation will follow the procedure established by the New York City Department of Purchase in which letterpress or offset printing and all accessory operations as required will be done in a union printing plant located within the City of New York. The union label must appear on all printing except letterheads and noteheads.
>
> This policy applies to the hospitals as well as Central Office procurement.

10 430 F. Supp. at 584.

11 The district judge found:

> Even assuming that the purpose was to ensure that the prevailing wage rate is paid the evidence here refutes defendants' contention that the challenged classification rationally furthers that purpose. We will assume, *arguendo*, that Section 220 of the New York State Labor Law sets the prevailing wage rate, as defendants contend. That statute defines "the prevailing rate of wages" as that rate paid to the majority of workmen, laborers or mechanics in the same trade. It does not mention labor unions.
>
> The only testimony before us concerning the employment status of the "majority of workmen, laborers or mechanics" in the printing trade is that there are 350 non-union, as compared to 250 union, shops in a trade association known as Printing Industries of Metropolitan New York. This evidence indicates that the prevailing wage rate, as defined by the statute on which defendants rely, follows the non-union rate more closely than the union rate and, therefore, undermines defendants' contention that the union label requirement safeguards payment of the prevailing wage rate.
>
> Moreover, plaintiffs' expert testified that there is no correlation between the union or non-union status of a printing company and the wage rates it pays to its employees; some non-union rates are as high or higher than some union rates. He further testified that union rates vary considerably.
>
> Union rates, therefore, do not necessarily meet the prevailing wage rate. More fundamentally, there is no evidence here of any natural, logical or necessary correlation between the union wage rate and the prevailing wage rate. Nor is there any evidence showing any reason why non-union rates might not approximate the prevailing wage rate as closely as union rates. The presumption of validity must yield to the evidence which showed that there was no logical or even statistical correlation between the prevailing wage rate and the union or non-union status of the printing company.

Id. at 584-85 (footnotes omitted).

II

Discussion

A. *Abstention*

1. "Pullman" Abstention.

Judge MacMahon was correct in not exercising his discretionary authority under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 500-01 (1941), to abstain when state law is uncertain and a state court construction might obviate the need for federal constitutional adjudication. This case, as in *McRedmond* v. *Wilson*, 533 F.2d 757, 759 (2d Cir. 1976), "does not present the narrowly limited circumstances permitting invocation of the doctrine . . . ." A decision on the constitutional claims does not depend on an interpretation of unclear or complex state law. *See id.* at 760, 762. There is no ostensible basis for interpreting the Resolution, or the bidding requirements implementing it, to permit nonunion shops to do flat-form printing for the City. Even if nonunion shops pay the prevailing wage rate, *see* note 6 *supra*, they are nevertheless precluded from bidding because the Resolution is drafted in the conjunctive: the printer must be "a union plant *and* pay the prevailing rate of wages." (Emphasis added.) The union-status requirement is clear and without ambiguity. *Cf. Lake Carriers' Association* v. *MacMul-*

lan, 406 U.S. 498, 511 (1972) (abstention appropriate where statute is unclear "in particulars that go to the foundation of . . . grievance").

2. "Younger" abstention.

Allied's request for federal court abstention based on *Younger* v. *Harris*, 401 U.S. 37 (1971), and subsequent cases amplifying *Younger*, *e.g.*, *Juidice* v. *Vail*, 430 U.S. 327 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), is totally misplaced. There is no ongoing, *see, e.g.*, *Trainor* v. *Hernandez*, 431 U.S. 434 (1977), or even contemplated, *see Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 929 (1975), state proceeding with which the federal action interferes. While appellees claim that the Resolution is invalid under state law,[12] this is a wholly inadequate basis for invoking federal court abstention.

B. *Justiciability*

1. Standing.

As prospective bidders for City business, appellees clearly have economic interests at stake sufficient to give them standing.[13] Their injury in fact is loss of business which, even though indirect, is "fairly traceable to the defendant's acts or omissions." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977). Since the trial court found that some nonunion shops were perfectly capable of doing the City's

12 Neither our decision nor that of the district court addresses these claims.

13 Appellees have standing even under the most restrictive of recent Supreme Court standing cases, *see, e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth* v. *Seldin*, 422 U.S. 490 (1975), and of recent standing cases in this court, *see, e.g.*, *City of Hartford* v. *Town of Glastonbury*, 561 F.2d 1032 (2d Cir. 1977) (en banc), *petition for cert. filed*, 46 U.S.L.W. 3323 (U.S. Nov. 15, 1977) (No. 77-639).

work, 430 F. Supp. at 584, 585, appellees' injury is a type "likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

2. Ripeness.

We read Allied's standing argument as implicitly questioning the ripeness of appellees' claims. Essentially, Allied suggests that appellees should have bid for City work and been turned down in order to present a justiciable claim. However, it would have been futile to do so since it is obvious that they could not have been awarded a contract.

In *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973), the Court *sub silentio* found a ripe controversy in circumstances virtually identical to those present in *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947). The reason for the different outcomes on the ripeness issue in *Letter Carriers* and in *Mitchell* must have been the passage of time and the ensuing accumulation of experience, interpretation and administration of the Hatch Act. *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 32 (2d ed. Supp. 1977). The record indicates that a number of policy memoranda and contract forms have been developed to implement the union label rule, *see* notes 7-9 *supra*, which was first promulgated in 1934. After 43 years of following its pro-union policy the City's position is amply developed. Requiring a nonunion shop to undergo the expense of preparing a bid with the certainty that it will be rejected imposes unnecessary financial hardship, *see Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 153 (1967), without framing the issues more sharply.

C. *Preemption.*

We do not believe that Section 7 of the NLRA, note 4 *supra*, preempts and thereby invalidates the City's Resolution under the Supremacy Clause of the Constitution. Section 7 gives employees the right not to join a union under certain circumstances. Neither the City's Resolution nor its policy memoranda and bidding instructions implementing the Resolution requires any employee to join a union. Rather, the City's policy merely prefers union *shops* to nonunion *shops* in warding flat-form printing contracts. Moreover, nothing in the sparsely developed record indicates that the City's flat-form printing needs, as distinguished from either the City's overall printing needs or the total printing work available in and around New York City, are substantial enough to have even an indirect coercive effect on nonunion employees to abandon their Section 7 right not to join a union. Indeed, the only relevant statistic in the entire record belies such an effect: the obvious logical inference to be drawn from the presence of 350 nonunion shops and 250 union shops in the printing business in New York City is that printing employees have not in substantial number relinquished their Section 7 rights.[14] Because appellees have nowhere indicated how the City's practice in any way alters the collective bargaining relationship within nonunion shops. there is no need to determine whether Congress intended that federal labor law preempt those local practices which do alter collective bargaining relationships. *Cf. New York Telephone Co.* v. *New York State Department of Labor*, No. 77-7337, slip op. at 6385 (2d Cir. Nov. 9, 1977) (even where state unemployment compensation benefits paid to striking employees may affect union's ability to maintain

14 The record does not indicate whether the total number of nonunion employees is greater than the total number of union employees.

a strike, Congress intended to allow states to legislate in this area).

D. *The Merits*

Just as the Due Process clause of the Fourteenth Amendment did not "enact Mr. Herbert Spencer's Social Statics," [15] the Equal Protection Clause of the same amendment[16] did not enact Professor Milton Friedman's economics of the marketplace.[17] Since the days of the Depression the declared policy of the nation has been to foster collective bargaining, NLRA § 1, 29 U.S.C. § 151. Similarly, the avowed policy of the State of New York, embodied in its State Labor Relations Act, is to promote collective bargaining:

> It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining, substantially and adversely affect the interest of employees, other employers, and the public in general. . . .
>
> . . . .
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively, removes certain recognized sources of industrial strife

15 *Lochner* v. *New York*, 198 U.S. 45, 75 (1905) (Holmes, *J.*, dissenting).

16 Justice Holmes's famous statement in *Lochner* referred to the Fourteenth Amendment as a whole although the decision rested on the Due Process clause. The Equal Protection clause, until Mr. Justice Jackson's prescient concurrence in *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 111 (1949), had been relegated to the status of the "last resort of constitutional arguments." *Buck* v. *Bell*, 274 U.S. 200, 208 (1927) (Holmes, *J.*).

17 *E.g.*, M. Friedman. *There's No Such Thing as a Free Lunch* (1975).

> and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and tends to restore equality of bargaining power between and among employers and employees, thereby advancing the interests of employers as well as employees.[18]

In the depths of the Depression in 1934, when the Resolution was promulgated (although before the State Labor Relations Act was itself adopted), it was entirely rational for the City fathers to believe that it was "in the public interest that equality of bargaining power be established and maintained" and that their pro-union Resolution would restore "equality of bargaining power" to printing employees, remove "certain recognized sources of individual strife and unrest," raise "the purchasing power of wage earners," reduce unemployment, and lessen the effects of "recurrent business depressions." N.Y. Labor Law § 700 (McKinney 1977). At least, that is what we read into the preamble to the Resolution insofar as it refers to lending "the greatest measure of and assistance during the present economic depression" to those citizens engaged in the printing industry.[19] To be sure, times have changed. Perhaps, as a matter of policy, favoring unionized employers should

18 N.Y. Labor Law § 700 (McKinney 1977).

19 Intervenor's answer, ¶ 13, refers in addition to "special values" from union labels and "assurances of craftsmanship," to the Resolution's promoting "assurance of satisfactory working conditions collectively bargained on behalf of the employees, assurance of freedom from labor disputes for the durations of said collective bargaining agreements, effectuation of the public policy of the State of New York and other benefits to the defendants . . . ." We believe the court can and should take judicial notice of the policies underlying the federal and state labor relations acts, that the Intervenor advanced these policies as justification for the Resolution by its answer below, and that a city might *rationally* think those policies promoted by the specifications here in issue.

be reexamined by the responsible authorities, now that both the quality of printing and the wages paid may be roughly equivalent. *See* 430 F. Supp. at 584-85. But reevaluating the wisdom of the Resolution is a legislative decision. And in economic matters, whether under the guise of substantive due process, *Ferguson* v. *Skrupa*, 372 U.S. 726, 729-32 (1963); *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955); *see* Comment, 50 N.Y.U.L. Rev. 1149, 1152 & n.16 (1975), or of equal protection, *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976); *Dandridge* v. *Williams*, 397 U.S. 471, 486-87 (1970); *Williamson* v. *Lee Optical, Inc.*, *supra*, 348 U.S. at 488-89, the courts have not, since the days of the Depression, interfered with legislative judgments rationally related to a legitimate governmental objective.

Judgment reversed.

ANDERSON, *Circuit Judge, concurring in part, dissenting in part:*

I concur in those portions of the majority opinion which uphold the district court's conclusions concerning abstention, standing, ripeness and federal preemption, but I dissent from the holding on the merits and the reversal of the judgment of the district court.

At the trial below, appellants asserted that the City's restrictive bidding policy served several purposes: (1) to effectuate New York law requiring the payment of the prevailing wage rate to workers under public contract, Labor Law §220(3); (2) to further the City's interest in obtaining work of good quality; and (3) to facilitate the policing of printers' claims for overtime wages. After carefully considering the evidence presented in support of these claims, the district court correctly rejected them.

At no time before or during the trial did appellants argue that the City's policy was designed to further the federal and state interest in fostering collective bargaining. See National Labor Relations Act §1, 29 U.S.C. §151; New York Labor Law §700. The appellants raised this contention for the first time on appeal, and it is wholly unsupported by any evidence in the record or any offer of proof. See *Sugarman* v. *Dougall*, 413 U.S. 634, 645 (1973). It was presented at oral argument as the principal justification for the policy. The majority accepts this rationale, and, relying on the language of Labor Law §700, concludes that the City's pro-union Resolution reflects a considered legislative judgment that such a policy will help to restore equality of bargaining power to printing employees and to lessen the effects of recurrent business depressions. In the absence of supporting proof for these conclusions, the majority's adoption of appellants' eleventh hour justification for the restrictive policy is unwarranted. Although legislative economic classifications are presumed to be constitutional, it is not evident that the pro-union Resolution in question here is rationally related to the state's legitimate interest in fostering collective bargaining. There has been no showing that the City's bidding regulation was intended to or does, in fact, promote this purpose. The preamble to the Executive Order of April 12, 1934, simply states: "Resolved that in order to lend the greatest measure of aid and assistance *during the present economic depression* to those citizens of our city engaged in the various branches of the printing industry, the following provisions be made a part of each and every contract and open market order issued by the Board of City Record." (Emphasis added.) As stated in an affidavit submitted by appellants, the policy was enacted to alleviate the high rate of unemployment that confronted union employees in the printing industry in New York City in 1934. No more expansive

legislative history accompanied the Resolution; no further explanations of its purposes were offered when subsequent administrations made *executive* decisions to continue this restrictive practice; and no mention of a desire to promote collective bargaining was ever made in connection with this "union shop only" policy.

Appellants concede that the Resolution is no longer justified by a need to keep printing businesses in New York City or to provide jobs for union workers. See *Abie State Bank* v. *Bryan*, 282 U.S. 765 (1931). Instead, they argue that it has other beneficial effects for the City. They attempted to demonstrate its importance at the trial, but failed even to discuss its relationship to the goal of collective bargaining or the purposes of New York Labor Law §700.

The majority cannot rely upon this state statute, however, because it was not added to the New York Labor Relations Act until 1940—six years after the promulgation of the pro-union Resolution—and, therefore, an effort to further its purposes cannot be imputed to the signers of the Executive Order. Moreover, it is significant that while §700 is designed to promote collective bargaining, it makes no effort to preclude non-union shops from bidding on public works contracts. General Municipal Law §103 makes it clear that, except as otherwise expressly provided by a local law adopted prior to September 1, 1953, contracts for public work, including printing contracts, are to be awarded to the *lowest responsible bidder*. The "lowest responsible bidder" has been held to include non-union as well as union shops, see ***Apex Indust. Const. Corp.*** v. ***Village of Lake George***, 31 A.D.2d 670, 295 N.Y.S.2d 548 (1968); *Long Island Signal Corp.* v. *County of Nassau*, 51 Misc.2d 320, 273 N.Y.S.2d 188 (1966); and, therefore, agencies of New York *State* could not lawfully refuse to award

a contract to a successful bidder solely because it employed non-union workers.

When local economic regulations are challenged as violating the Equal Protection Clause, the court will defer to legislative determinations as to the desirability of particular statutory discriminations, provided that the classification challenged is rationally related to a legitimate state interest. *New Orleans* v. *Dukes*, 427 U.S. 297 (1976); *Dandridge* v. *Williams*, 397 U.S. 471 (1970). In this case, appellants have failed, however, to show that the City's ban on the use of non-union labor in performing certain public printing contracts has any bearing upon the state's interest in collective bargaining or the payment of the prevailing wage rate or to the City's interest in the ability of the printing shops reliably to perform high quality work.[1] Cf. *Sugarman* v. *Dougall*, *supra*.

The City is a corporate body and, as such, it may enter into contracts and hold and dispose of property. When it does so, however, it acts as trustee for the people of the City, and it is in this trust capacity that, in the City's name, it enters into contracts and expends the people's money through a city government of the people's own creation. The city, therefore, has an obligation to conserve public funds. To this end, regulations were enacted to govern bidding on public contracts to ensure that such contracts are awarded to the lowest responsible bidder. These regulations are designed to benefit the public, not the bidders. See *General Bldg. Contractors* v. *Bd. of Trustees*, 42 A.D.2d 660, 345 N.Y.S.2d 195 (1973); *Allen* v. *Eberling*, 24 A.D.2d

1 Appellants would have this court take judicial notice that union printing shops would be more reliable in meeting contract deadlines than non-union shops because labor disruptions would be minimized. They have introduced no evidence to support this claim and the court should not take it upon itself to attribute irresponsibility in labor matters to the owners of non-union shops where there has been no proof of such conduct.

594, 262 N.Y.S.2d 121 (1965); *Marino* v. *Town of Ramapo*, 68 Misc.2d 44, 326 N.Y.S.2d 162 (1971). They should not be used to promote the interests of labor organizations by forcing printing shops to unionize in order to qualify for city contracts. Both union and non-union shops have a right to apply for public printing contracts on equal terms. The conditions which must be met to receive the award of such a contract must be reasonable and related to qualifications for the job to be performed. In this case, appellants' restrictive, "union shop only" policy fails to meet this test.[2]

Accordingly, I would affirm the judgment of the district court.

2 If, instead of having before it the present case, this court were to be presented with an attack by organized labor on the obverse of the city's present policy, i.e., a policy restricting bidding on city printing contracts to *non*-union shops only, there is little doubt that the court would hold that such a resolution was inconsistent with state law designed to protect the right of employees to freedom of association and organization, and that it was, therefore, invalid. New York Labor Law §712; see also, Municipal Home Rule Law §10; *Wholesale Laundry Bd. of Trade, Inc.* v. *City of New York*, 17 A.D.2d 327, 234 N.Y.S.2d 862, *aff'd*, 12 N.Y. 2d 998, 239 N.Y.S.2d 128 (1962); *City of Corning* v. *Corning Police Dept.*, 81 Misc.2d 294, 366 N.Y.S.2d 241, *aff'd without opinion*, 373 N.Y.S.2d 1022 (1975). State statutes which touch or concern labor relations, however, should be neutral. *Lodge 76, International Ass. of Machinists* v. *Wisconsin Emp. Rel. Commission*, 427 U.S. 132, 149-150 (1976); *New York Tel. Co.* v. *New York State Dept. of Labor*, —— F.2d —— (2d Cir. Nov. 9, 1977), slip op. at 6385; and although the New York State Labor Relations Act encourages collective bargaining, it does not mandate it; nor does it require that all labor performed for the state or its subdivisions must be consummated by organized labor and by no one else. By exerting economic pressure on unorganized employees to unionize, the city's pro-union Resolution interferes, just as significantly as would a "non-union only" policy, with associational freedoms protected by state law; and, therefore, should not be declared lawful. The impartial and even-handed administration of justice as well as the interests of the public call for a balanced and fair approach which makes neither the union employees nor the non-union employees an ineligible class of bidders.

APPENDIX C

DISTRICT COURT DECISION

Opinion of MacMahon, J.

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Opinion of MacMahon, J.

MACMAHON, *District Judge.*

Plaintiffs, non-union printers, allege that defendants' practice of restricting bidding upon, and of awarding printing contracts to, only those printing establishments whose employees are represented by labor organizations and who can therefore exhibit the union label deprives them of an opportunity to bid on these contracts, in violation of their rights under the due process and equal protection clauses of the Fourteenth Amendment, and is contrary to New York state law, the New York City Charter, and public policy. They seek a declaratory judgment and an injunction prohibiting that practice.

A non-jury trial was held before us on December 6, 1976 to determine these issues, and the following constitutes our findings of fact and conclusions of law.

Plaintiffs challenge the union label requirement on both federal constitutional and state law grounds, and since decision upon state grounds might avoid needless constitutional adjudication, we must consider, in light of the doctrine announced in *Railroad Comm'n of Texas* v. *Pullman Co.*,[1] whether abstention is appropriate.

Abstention is an equitable doctrine and has its origins in principles of federalism and comity.[2] It serves to avoid needless friction with, and demonstrates proper respect for, state law and state courts. It is not a rule of necessity,[3] and the decision to abstain is vested in the sound discretion of the district court.[4] The doctrine is applicable only in special circumstances[5] and only when the issue of state law is uncertain,[6] as it is here. We do not think, however, that abstension is warranted here because neither party has even raised, much less requested abstention, and the case, after considerable delay, has already been tried.[7] Furthermore, there is no vital state or city interest, nor elaborate regulatory program involved, and consequently

the interference with the city's administration of its own affairs resulting from a determination that the union label requirement is invalid would be minimal.[8] Finally, the constitutional question, whether the union label policy violates the Fourteenth Amendment, is of very narrow compass.[9]

Under these circumstances, we think that the injustice of subjecting plaintiffs to added expense and delay outweighs the advantages which may accrue from adherence to the traditional policy of avoiding constitutional adjudication by abstention.[10]

The question of whether the union label requirement violates state law or the New York City Charter is sufficiently unsettled,[11] especially as compared to federal constitutional precedent in this area,[12] to make a decision as to its validity on that basis inappropriate. We, therefore, proceed to consider the validity of the union label requirement under the due process and equal protection clauses.

There is no dispute that the Department of Purchase,[13] which awards all the printing contracts for New York City, the Board of Education[14] and the New York City Health and Hospital Corporation,[15] have adopted a policy requiring that all public printing work must be done in a union plant located in New York City and bear the union label, save for letterheads, noteheads or unless otherwise excepted. Defendants claim that this policy is justified because it rationally furthers legitimate municipal interests, even though it deprives plaintiffs of an equal opportunity to bid upon and to be awarded printing contracts.

We must determine, at the outset, whether the due process and equal protection guarantees of the Fourteenth Amendment are applicable to the award of public printing contracts in light of *Atkin* v. *Kansas*[16] and its progeny. The Supreme Court, in *Atkin*, upheld a Kansas statute which regulated the pay and limited the hours of employees

of the state, its subdivisions and public contractors. The Court stated that, since the work was of a public character, "it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others. . . ."[17]

Relying in part on *Atkin*, the court held, in *American Yearbook Co.* v. *Askew*,[18] that a Florida statute requiring all public printing to be done in the state was not violative of the equal protection clause because the award of such contracts was a proprietary, or a business, rather than a governmental function, and that, when a municipality or state acted in such capacity, it was exempt from the limitations of the equal protection clause.[19]

Since plaintiffs do not challenge the requirement here that public printing be done in a plant located in New York City, the specific holding in *American Yearbook* is inapplicable. Furthermore, that holding could be sustained on the principle that the equal protection clause is confined to persons within the jurisdiction of the state which enacted the challenged statute.[20] In any event, the Supreme Court has ruled that the due process[21] and equal protection[22] guarantees are applicable to public employment. While the coverage afforded by these two guarantees often overlaps, the appropriate analysis under each is different.[23]

The Supreme Court has rejected the right-privilege distinction employed in due process analysis by *Atkin*, as well as a number of earlier cases.[24] Therefore, it no longer suffices to say that, although a government may not deprive someone of a right arbitrarily, it may do so in the case of a privilege.[25] However, the plaintiff must still demonstrate the deprivation of some liberty or property interest protected by the Fourteenth Amendment in order to invoke the due process guarantee.[26]

Plaintiffs here have not addressed themselves to the issue of whether their opportunity to bid on public contracts is one of liberty or property within the meaning of the due process clause, but we need not decide this issue since we have determined that the union label requirement violates the equal protection clause.

The equal protection clause is a more explicit safeguard than the due process clause,[27] and its coverage is not confined to deprivations of liberty or property. Although the Supreme Court held that the equal protection clause was not violated in *Atkin*, it clearly indicated that the clause is applicable to public employment regulations[28] and, as recently as *Massachusetts Board of Retirement* v. *Murgia*,[29] has subjected such regulations to equal protection scrutiny even though they were promulgated by the state in its proprietary capacity as an employer.

We see no justification in the case law, the language of the Amendment, or in reason for restricting the reach of the equal protection clause. Indeed, such a course would be fraught with danger to the very principles underpinning the Amendment. We, therefore, turn to the question of whether the union/non-union classification here violates the equal protection clause.

Traditional equal protection analysis is a two-tiered system. Strict scrutiny of a classification is required only if the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvange of a suspect class.[30] If not, then the classification is examined under the relatively relaxed rational basis standard, which requires only that the classification rationally furthers a legitimate purpose identified by the state,[31] and, under that standard, the classification is presumed valid.[32] Since we find that the union label requirement does not satisfy the rational basis standard,[33] it is unnecessary to determine whether a strict scrutiny test should be applied.

Defendants contend that the union label requirement rationally furthers the city's interest in obtaining good quality work. The relevant equal protection inquiry, therefore, is directed to the quality of union, as opposed to non-union, printing.

Plaintiffs' expert testified that the quality of work does not depend on the union or non-union status of the printing establishment and that, in general, the work required by the city did not require a high level of skill. Moreover, three non-union printers testified that they could perform the work required by the city with the requisite degree of skill and competence. The roster of their representative clients confirmed the good quality of their work.

We find, therefore, in light of all the evidence, that there is no rational relationship between the union label requirement and the interest of the city in obtaining good quality work.

Defendants also contend that the union label requirement enables them to police effectively the city's policy that employees receive prevailing rates of wages. We think that justification is attenuated to the point of irrelevancy, but, in any event, it fails on other grounds.

The union label requirement was established by executive order in 1934 "to lend the greatest measure of aid and assistance during the present economic depression" to printing employees.[34] That order also contained provisions establishing the policy that prevailing wages should be paid to printing employees and providing that if any question were raised as to the wage rates of the lowest bidder, the N.R.A. Compliance Board would be requested to submit a report on the bidder's compliance "with the code requirements." We doubt that the union label requirement could rationally have been intended to ensure that the prevailing wage rate is paid to printers' employees because that requirement was unnecessary in light of these other provisions.[35]

Even assuming that the purpose was to ensure that the prevailing wage rate is paid, the evidence here refutes defendants' contention that the challenged classification rationally furthers that purpose. We will assume, *arguendo,* that Section 220 of the New York State Labor Law sets the prevailing wage rate, as defendants contend.[36] That statute defines "the prevailing rate of wages" as that rate paid to the majority of workmen, laborers or mechanics in the same trade. It does not mention labor unions.

The only testimony before us concerning the employment status of the "majority of workmen, laborers or mechanics" in the printing trade is that there are 350 non-union, as compared to 250 union, shops in a trade association known as Printing Industries of Metropolitan New York. This evidence indicates that the prevailing wage rate, as defined by the statute on which defendants rely, follows the non-union rate more closely than the union rate and, therefore, undermines defendants' contention that the union label requirement safeguards payment of the prevailing wage rate.

Moreover, plaintiffs' expert testified that there is no correlation between the union or non-union status of a printing company and the wage rates it pays to its employees; some non-union rates are as high or higher than some union rates. He further testified that union rates vary considerably.

Union rates, therefore, do not necessarily meet the prevailing wage rate. More fundamentally, there is no evidence here of any natural,[37] logical[38] or necessary correlation between the union wage rate and the prevailing wage rate. Nor is there any evidence showing any reason why non-union rates might not approximate the prevailing wage rate as closely as union rates. The presumption of validity must yield to the evidence which showed that there was no logical or even statistical correlation between the prevailing wage rate and the union or non-union status of the printing company. We, therefore, conclude that the challenged classification does not rationally further the city's interest in safeguarding the payment of prevailing wages.

The other arguments advanced by defendants in support of the union label requirement are equally unpersuasive. Their contention that the requirement facilitates policing of printers' claims for overtime wages because union rates are more easily ascertainable is refuted by the undisputed testimony of plaintiffs' expert that all overtime rates must be specified in every contract.

Defendants further argue that the city is benefited by the union label requirement because it results in better quality work due to the fact that the union operates schools which keep abreast of the latest technology. The relevant inquiry, however, is not whether the union conducts training programs but the comparative effectiveness of union versus non-union programs. Here, again, the only evidence before us is the undisputed testimony of plaintiffs' expert witness that the on-the-job training programs of non-union shops are at least as, and perhaps more, effective than training programs typically conducted outside the shop by the unions. Moreover, we have previously found that there is no correlation between the quality of work and the union or non-union status of the printing shop. Finally, the evidence refutes defendants' contention that the union label policy obviates the need for inspections of printing shops, and we reject it.

Accordingly, we find that defendants' policy and practice of restricting bidding upon, and of awarding printing contracts to, only those printing establishments whose employees are represented by labor organizations and who can, therefore, exhibit the union label violates the equal protection clause of the United States Constitution.[39]

The foregoing constitutes our findings of fact and conclusions of law, in accordance with Rule 52(a), Fed.R.Civ.P.

Settle an order within ten (10) days not inconsistent with this opinion.

Dated: New York, N. Y.
April 7, 1977

LLOYD F. MACMAHON
LLOYD F. MACMAHON
United States District Judge

FOOTNOTES

[1] 312 U.S. 496, 500-01 (1941).

[2] See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 328 (1964); *Railroad Comm'n of Texas* v. *Pullman Co., supra*, 312 U.S. at 500-01.

[3] See C. Wright, Law of Federal Courts § 19, p. 63 (2d ed. 1970).

[4] See *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965).

[5] See *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967).

[6] See *Harman* v. *Forssenius, supra*, 380 U.S. at 534.

[7] *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra*, 377 U.S. at 329; see *Harris County Comm'rs Court* v. *Moore*, 420 U.S. 77, 84 (1975); *California* v. *LaRue*, 409 U.S. 109, 124 n.2 (1972); cf. *Provident Trademens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 126 (1968).

[8] *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra*, 377 U.S. at 329; see *Harman* v. *Forssenius, supra*, 380 U.S. at 534.

[9] Compare *Idlewild Bon-Voyage Liquor Corp.* v. *Epstein*, 212 F. Supp. 376, 382 (S.D.N.Y. 1962) (three-judge court), *aff'd sub nom. Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra*, 377 U.S. 324, with *Railroad Comm'n of Texas* v. *Pullman Co., supra*, 312 U.S. 496, and *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U.S. 456, 463 (1943).

[10] *Idlewild Bon-Voyage Liquor Corp.* v. *Epstein, supra*, 212 F. Supp. at 380; see *Allegheny County* v. *Frank Mashuda Co.*, 360 U.S. 185, 196-97 (1959); *Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U.S. 77, 84 (1958).

[11] Union label requirements have been the subject of previous litigation in New York courts. An early case, *Davenport* v. *Walker*, enjoined the awarding of a contract on the basis of such a requirement, holding that the union label requirement was unconstitutional and clearly against public policy. *Davenport* v. *Walker*, 57 A.D. 221, 68 N.Y.S. 161, 164 (1901). See also *People ex rel. John Single Paper Co.* v. *Edgcomb*, 112 A.D. 604, 98 N.Y.S. 965, 966 (1906).

However, two subsequent cases approved the requirement at issue in this case. *Burland Printing Co.* v. *LaGuardia*, 9 N.Y.S.2d 616, 618 (Sup. Ct. 1938); *Amalithone Realty Co.* v. *City of New York*, 162 Misc. 715, 295 N.Y.S. 423, 425, *aff'd*, 297 N.Y.S. 262

(1937). Recent New York decisions have cast doubt upon the present validity of the union label requirement and the continued vitality of the *Amalithone* and *Burland* cases. See *Apex Indus. Const. Corp.* v. *Village of Lake George*, 31 A.D.2d 670, 295 N.Y.S. 2d 548, 549 (1968); *Long Island Signal Corp.* v. *County of Nassau*, 51 Misc.2d 320, 273 N.Y.S.2d 188, 194 (1966).

[12] See *Master Printers Ass'n* v. *Board of Trustees of Junior College Dist. 508*, 356 F. Supp. 1355, 1357 (N.D. Ill. 1973); see also *Anthony P. Miller, Inc.* v. *Wilmington Housing Authority*, 165 F. Supp. 275, 279-80 (D. Del. 1958); Abstention in Constitutional Cases, 122 U. Pa. L. Rev. 1071, 1100 (1974).

[13] See plaintiffs' Exhibit 1, Supplement to Standard Instructions to Bidders for Use in Printing Only, Form 23-L-46. Policy established in 1934.

[14] See plaintiffs' Exhibit 3, Standard Form of Contract Proposal, Form C.E. 8 (Part 1). Policy established in 1939.

[15] See plaintiffs' Exhibit 5, Memo dated December 3, 1971, from Mr. Brady, Assistant Sr. Vice-President, Finance, and Mr. Katz, Director, Procurement. Policy established 1971.

[16] 191 U.S. 207 (1903).

[17] *Id.* at 224.

[18] 339 F. Supp. 719 (M.D. Fla. 1972) (three-judge court), *aff'd without opinion*, 409 U.S. 904 (1972).

[19] *Id.* at 721-23.

[20] *Township of River Vale* v. *Town of Orangetown*, 403 F.2d 684, 687 (2d Cir. 1968).

[21] See *Perry* v. *Sindermann*, 408 U.S. 593, 599-603 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564, 571-78 (1972); See also *Thompson* v. *Gallagher*, 489 F.2d 443, 446-47 (5th Cir. 1973).

[22] See *Massachusetts Board of Retirement* v. *Murgia*, 44 U.S. L.W. 5077 (U.S. June 26, 1976); cf. *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952). See also *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947); *Thompson* v. *Gallagher*, *supra*, 489 F.2d at 446-47; *Burt* v. *City of New York*, 156 F.2d 791, 792 (2d Cir. 1946); *Mando* v. *Beame*, 398 F. Supp. 569, 572 (S.D.N.Y. 1975).

[23] See *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954); 87 Harv. L. Rev. 1842, 1844-45 (1974).

[24] See *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970).

[25] See *Thompson* v. *Gallagher*, *supra*, 489 F.2d at 446.

[26] See *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 571-72.

[27] See *Bolling* v. *Sharpe*, *supra*, 374 U.S. at 499.

[28] See *Atkin* v. *Kansas*, *supra*, 191 U.S. at 224.

[29] 44 U.S.L.W. 5077 (U.S. May 26, 1976); see *Thompson* v. *Gallagher*, *supra*, 489 F.2d at 446-47; *Mando* v. *Beame*, *supra*, 398 F. Supp. at 572.

[30] See *Id.* at 5079; *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 16 (1973).

[31] See *Massachusetts Board of Retirement* v. *Murgia*, *supra*, 44 U.S.L.W. at 5079; *San Antonio Independent School District* v. *Rodriguez*, *supra*, 411 U.S. at 40-41; *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).

[32] See *Massachusetts Board of Retirement* v *Murgia*, *supra*, 44 U.S.L.W. at 5079; *San Antonio Independent School District* v. *Rodriguez*, *supra*, 411 U.S. at 40-41.

[33] See *Massachusetts Board of Retirement* v. *Murgia*, *supra*, 44 U.S.L.W. at 5078.

[34] See plaintiffs' Exhibit 2, Extract from Minutes of Meeting of Board of City Record, held April 12, 1934.

[35] See *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 536-37 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438, 452 (1972). See also Fair Labor Standards Act. 29 U.S.C. § 206; N.Y. Labor Law §§ 220, 652; Administrative Code of City of New York § 343-9.0 (a)(1)(f).

[36] But see 3 Op. State Compt. 293 (1947); 1943 Op. Atty. Gen. 110, 111. There is nothing in the order establishing the prevailing wage rate policy to determine how that rate is to be determined other than the oblique and tangential reference to "code requirements," presumably a "code of fair competition" promulgated pursuant to the National Industrial Recovery Act, which was declared unconstitutional in 1935. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

[37] See *Massachusetts Board of Retirement* v. *Murgia*, *supra*, 44 U.S.L.W. 5077, where the Supreme Court concluded that mandatory retirement at age 50 for uniformed policemen rationally

furthered the state's purpose of protecting the public by assuring the physical preparedness of its uniformed police because fitness for uniformed work generally and naturally diminishes with age.

[38] See *Hughes* v. *Alexandria Scrap Corp.*, 96 S.Ct. 2488 (1976), where the Supreme Court upheld a Maryland statute whose purpose was to rid Maryland of auto hulks, requiring more extensive documentation from out-of-state than in-state unlicensed hulk suppliers. The Court found the Legislature could reasonably assume that a hulk destroyed by an out-of-state processor was more likely to have been abandoned outside the state and that the documentation requirement, by making it easier for an in-state than an out-of-state processor to receive bounties, tended to ensure that the state's limited resources were targeted to hulks abandoned inside Maryland.

[39] See *Master Printers Ass'n* v. *Board of Trustees of Junior College Dist. 508, supra*, 356 F. Supp. at 1357; *accord, State ex rel. United Dist. Heating, Inc.* v. *State Office Bldg. Comm'n*, 124 Ohio St. 413, 179 N.E. 138, 139 (1931), 125 Ohio St. 310, 181 N.E. 129 (1932); *Marshall & Bruce Co.* v. *Nashville*, 109 Tenn. 495, 71 S.W. 816-19 (1903). See also Annot., 110 A.L.R. 1406.

Order of MacMahon, J.

ORDER

This case having come on hearing upon Plaintiffs' Complaint for Declaratory Judgment and Injunctive Relief, and the Court having rendered its opinion on April 7, 1977, declaring that the practice of restricting bidding upon, and the awarding of printing contracts to, only those printing establishments whose employees are represented by labor organizations and who can, therefore, exhibit the union label, was violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution, therefore, it is

ORDERED, ADJUDGED and DECREED that:

(1) The Defendants' policy and practice of restricting bidding upon, and of awarding printing contracts to, only those printing establishments whose employees are represented by labor organizations and who can, therefore, exhibit the union label, is violative of the Equal Protection Clause of the United States Constitution;

(2) The Defendants are hereby enjoined from implementing and enforcing the aforesaid policy and practice of restricting bidding upon and awarding printing contracts to only those printing establishments whose employees are represented by labor organizations and who can, therefore, exhibit the union label.

(3) The order herein is stayed pending the disposition of the appeal of this Order to the Second Circuit Court of Appeals, on condition taken that the appeal be taken and prosecuted within the minimum time provided by the rules of that court without any extensions or adjournments.

Dated: April 20, 1977

LLOYD F. MACMAHON
U.S.D.J.

APPENDIX D

COPY

Extract from minutes of meeting of Board of City Record, held April 12, 1934. 11:15 A.M.

BOARD OF CITY RECORD
OFFICE OF THE SUPERVISOR

NEW YORK, April 12, 1934.

STEPHEN G. KELLEY,
Supervisor.

RESOLVED, that in order to lend the greatest measure of aid and assistance during the present economic depression to those citizens of our City engaged in the various branches of the printing industry, the following provisions be made a part of each and every contract and open market order issued by the Board of City Record;

1. That all printed forms hereafter purchased for the use of the City of New York by the Board of City Record shall bear the label of the Allied Printing Trades Council of the City of New York. This rule shall not apply to letterheads and envelopes.

2. That all bidders be required to certify they operate a union plant and pay the prevailing rate of wages in all divisions of their establishment.

3. That wherever there may arise any doubt about the wages paid and labor conditions in the shop of the lowest bidder, on any contract or open market order issued by the Board of City Record, the N.R.A. Compliance Board be requested to submit a report on the bidder's compliance with the code requirements.

4. That on all requests for bids a statement be included that the City reserves the right to conduct an inspection of the work to be performed at the shop of the contractor during the process of manufacturing.

5. That the provisions of this resolution shall become effective on and after the 20th day of April 1934, and that the Supervisor of the City Record be, and he hereby is instructed to see that each and every one of these provisions are complied with.

ADOPTED, all members voting in the affirmative.

F. LaGuardia
Mayor

W. A. Cunningham
Comptroller

Paul Windels
Corporation Counsel

.....
Supervisor of the City Record.

Position	Original Respondents	New
Mayor	Abraham D. Beame	Edward I. Koch
Commissioner of Purchase of New York City	Robert Cohen	Gene Larkin
Comptroller	Harrision Goldin	Same
President, New York City Health & Hospital Corp.	John Holloman	Joseph T. Lynaugh
Members, Board of Directors, New York City Health and Hospital Corporation	June J. Christmas, M.D.	Same
	Frank Folk, M.D.	Same
	Vernal G. Cave, M.D.	Same
	Daniel J. Paulo, M.D.	Same
	Lowell E. Bellin, M.D.	Has terminated, was not replaced
	Paul Gibson	Has terminated, was not replaced
	James Dumpson	Blanche Bernstein
	Charles J. Bensley	Same
	Donald H. Elliot	Has terminated, was not replaced
	Milton F. Kirschman	Same
	William Michaelson	Same
	Elena Padilla	Same
Comptroller, New York City Health & Hospital Corp.	Robert J. Bradbury	Has terminated, not known if replaced
Director of Procurement, New York City Health and Hospital Corporation	Leonard Katz	Same

Position	Original Respondents	New
Chairman, New York City Board of Higher Education	Alfred A. Giardino	Harold M. Jacobs
Members, New York City Board of Education	Dr. Guerston Goldin,	Same
	Vincent R. Fitzpatrick	Loretta A. Conway
	Franklin H. Williams	Walter H. Crowley
	Mrs. Gustave Hauser	Armand D'Angelo
	Harold Jacobs	Same (now Chairman of the Board)
	Vinia R. Johnson-Quinones	Edith B. Everett
	Isiah E. Robinson, Jr.	Ronald T. Gault
		Albert V. Maniscalco
		Joan B. Maynard
		Emanuel R. Piore
		Joaquin Rivera
		David Z. Robinson
		Stuart Scheftel
		Patricia Carry Stewart
		David Valinski
		Edward A. Roberts
Director of Purchase New York City Board of Higher Education	Francis McGivney	Jeff Baicher
Comptroller, New York City Board of Higher Education	Abraham Rabinowitz	Arnold Riback
President, New York City Board of Education	Isiah E. Robinson, Jr.	Steven Aiello

Position	Original Respondents	New
Director of Purchasing, New York City Board of Education	Sol Berger	Same
Members, New York City Board of Education	Steven Aiello	Same
	Robert Christian	Same
	Dr. Amelia Ashe	Same
	Joseph G. Barkan	Same (now Vice President)
	Joseph Monserrat	Louis Rivera

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1625

Supreme Court, U. S.
FILED
JUL 10 1978
MICHAEL RODAK, JR., CLERK

IMAGE CARRIER CORPORATION, HOUSE OF LITHOGRAPHY, INC., ASSOCIATED LITHO AND LETTERING SERVICE, INC.,

Petitioners,

v.

EDWARD I. KOCH, MAYOR OF NEW YORK CITY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ALLEN G. SCHWARTZ,
Corporation Counsel of
The City of New York,
Attorney for Respondents,
Municipal Building,
New York, New York 10007
(212) 566-4426 or 4337

L. KEVIN SHERIDAN,
CAROLYN E. DEMAREST,
of Counsel.

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Questions Presented

1. Does the policy at issue have a rational basis sufficient to meet the Equal Protection standard applicable to local government decisions?

2. Do the petitioners have standing to raise the First Amendment rights of petitioners' employees for the first time upon this appeal?

3. Is the federal Pre-emption Doctrine applicable to the case at bar?

Statement of the Case

On April 12, 1934, the City of New York initiated a policy requiring that all printed forms, except letterheads and envelops, purchased for use by the City of New York bear a union label and that all bidders for contracts to supply such printed matter certify that they operate a union plant and pay prevailing wage rates.*

The purpose of the policy when initially promulgated was, as it is today, to assist members of the printing industry by fostering unionism, and to thereby advance the right of printing employees to bargain collectively for their terms and conditions of employment. Such policy is consistent with federal and state law enacted subsequent to initiation of the New York City policy. National Labor Relations Act, 29 U.S.C. §§151 et seq.; Norris-LaGuardia Act, 29 U.S.C. §§ 101 et seq.; New York Labor Law §§700 et seq.

*The executive order, as originally promulgated, required the label of the Allied Printing Trades Council, but that aspect of the policy was enjoined by the New York Supreme Court in 1937. Amalithone Realty Co., Inc. v. City of New York, 162 Misc. 715, 717 (Sup. Ct., Spec. T., N.Y. Co.), aff'd, 25 AD 450 (1st Dept., 1937).

Printing industry employees have long been recognized by labor authorities as particularly vulnerable to employer pressures against self-organization and collective bargaining. M. Dubofsky, When Workers Organize: New York City In the Progressive Era, p. 6 (1968). This is especially true in New York City where, prior to Mayor LaGuardia's Order, substantial efforts were required on the part of New York City mayors to resolve massive crippling organizational strikes in many industries. M. Dubofsky, supra at pp. 40-42 et seq., 103-104, 108. It is the express obligation of the City of New York to protect the welfare of the employees of a contractor performing work for the City. New York Municipal Home Rule Law §10(10). In light of the

history of the printing industry in New York City, the disputed policy substantially assists in meeting this obligation by helping the worker to protect himself.

The policy requiring independent printing contractors wishing to bid for City work to affix a union label also serves the purpose of bringing order and industrial harmony to at least some shops in a strike-prone industry, thereby ensuring the prompt and timely production of essential government printing.

The policy was challenged pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) by a group of non-union printers (petitioners) who are disqualified, as a result of the policy, from bidding on certain City printing jobs. The substance of the complaint alleged a violation of petitioners' due process

and equal protection rights under the Fourteenth Amendment. The complaint also asserted a violation of the rights guaranteed petitioners' employees under 29 U.S.C. §157, the right to reject labor union representation. No evidence appears in the record to support such assertions and the issue was clearly not considered by the lower courts.

The petitioners and the amici curiae further seek to assert the First Amendment rights of workers for the first time before this Court. There is no evidence in the record regarding the effect this policy has had upon the petitioners' employees and no employee has participated as a litigant in the suit.

Following trial, District Court Judge MacMahon limited his determination to the issue of Fourteenth Amendment equal protection

violations (20a-22a).* Rejecting, on the evidence, respondents' contentions that the policy ensures higher quality work, facilitates the policing of compliance with prevailing wage rates and payment of overtime rates, makes available more advanced technology and obviates the need for shop inspections, Judge MacMahon found no rational basis for the City's policy and concluded that it violates the equal protection clause of the United States Constitution (25a).

On appeal, the Second Circuit Court of Appeals reversed the District Court decision as to equal protection and found no violation of petitioners' due process rights (4a). The Court of Appeals did not

*Numbers in parentheses refer to pages of the Petition for Writ of Certiorari unless otherwise noted.

disturb any of the factual findings relied upon by the District Court, but found that the City's rationale for promulgating the subject policy, i.e., to equalize bargaining power by fostering unionism, was consistent with declared federal and state policy and met the rational basis test for equal protection.* The Court of Appeals concluded: "And in economic matters, whether under the guise of substantive due process,... or of equal protection, ... the courts have not, since the days of the Depression, interfered with legislative judgments rationally related to a legitimate governmental objective" (citations omitted) (13a).

*Contrary to petitioners' assertion that this rationale was first offered "during oral argument" (8), respondents thoroughly briefed such argument in their written submission to the Court of Appeals filed three months prior to oral argument.

POINT I

THE COURT OF APPEALS CORRECTLY FOUND THAT THE POLICY AT ISSUE HAS A RATIONAL BASIS AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION. THERE IS NO CONFLICT WITH APPLICABLE PRECEDENT.

The Executive Order of 1934 states that the reason the union label requirement was established was to aid and assist printing employees. District Court Judge MacMahon recognized this as the primary purpose of the challenged policy, but failed to consider it as supplying the rational basis necessary to meet equal protection standards (23a). This oversight on the part of the District Court did not preclude the Court of Appeals from finding such purpose sufficient as a matter of law in light of established federal and state policy to foster

collective bargaining so that the bargaining power of the worker may be more equitably balanced against that of his employer.*

In New Orleans v. Dukes, 427 U.S. 297, 303-304 (1976), this Court reiterated the rules applicable to the case at bar:

> "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations.... Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, ... in such economic areas, adopting regulations that only partially ameliorate a preceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, ...; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot

*Even without the rational basis supplied by this judicially approved legislative policy favoring unionization and collective bargaining (see National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)), there is adequate evidence in the record to substantiate respondents' contention that union membership, which is clearly promoted by the City policy at issue, does, in fact, improve the lot of the printing employee. For example, wages paid to union employees across the board are nearly twice those generally paid in non-union shops for comparable services. In addition, union workers receive substantial fringe benefits not available in the non-union shops operated by petitioners.

> stand consistently with the Fourteenth Amendment...." (citations omitted).

In the New Orleans case, this Court found the challenged "grandfather provision" in a local ordinance rationally related to the intent expressed in the legislation to preserve the character of the Vieux Carre, an objective this Court found to be obviously legitimate. Respondents submit that the decision of the Second Circuit Court of Appeals in the instant case is completely consistent with the principles recently set forth in New Orleans v. Dukes, Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 489-493 (1977) and Dandridge v. Williams, 397 U.S. 471 (1970). See also, Hughes v. Alexandria Scrap Corporation, 426 U.S. 794, 812 (1976), in which this Court expressly found to be unnecessary statistical

verification of a logical assumption that a particular policy will achieve a desired result.

It is uncontested that petitioners do not possess a fundamental right to obtain government contracts. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-314 (1976); Atkin v. Kansas, 191 U.S. 207, 222 (1903). "When the state exercises its proprietary or business power, ... it is subject to no more limitation than a private individual or corporation would be in transacting the same business.... [T]he letting of public contracts, particularly those providing for internal needs of government, is a proprietary function." American Yearbook Co., Inc. v. Askew, 339 F. Supp. 719, 721 (M.D. Fla., 1972, three judge court), aff'd w/o opin., 409 U.S. 904

(1972). See also, Perkins v. Lukens Steel Co., 310 U.S. 113, 127-128 (1940).

The decision of the Second Circuit Court of Appeals is correct and consistent in every respect with the rulings of this Court.

POINT II

THE FIRST AMENDMENT RIGHTS OF PETITIONERS' EMPLOYEES ARE NOT AT ISSUE IN THIS CASE.

Petitioners and their amicus curiae supporters urge this Court to grant certiorari to consider the right of petitioners' employees to refrain from collective bargaining activities and union membership pursuant to the National Labor Relations Act ("NLRA"), 29 U.S.C. §157 and the First Amendment to the United States Constitution. The statutory rights of workers under Section 7 of the NLRA are related to petitioners' pre-emption argument

and will be more fully considered at Point III.

The First Amendment rights of petitioners' employees were not raised in the complaint, nor were they litigated in the lower courts. There is no evidence in the record which supports the speculations of petitioners and the amici that the policy of requiring certain printing contracts to be awarded to union shops chills the exercise of First Amendment rights or frustrates the rights of workers to decertify a labor organization or even forces employees to initiate union representation. Indeed, the fact that the trend in the printing industry in New York City is away from union membership does, as Judge Oakes noted in his opinion for the Court of Appeals (10a), mitigate against such conclusion.

The policy at issue does not require workers to join a union, nor does it regulate the printing industry at large. The policy is limited in its application to those private contractors who wish to bid for government contracts. It is intended to provide an incentive to the employer to co-operate in workers' attempts to organize for the purpose of collective bargaining. In this respect, the policy is intended to assist the worker in securing those rights which petitioners claim have been violated. Petitioners' argument appears to fly in the face of accepted government policy, both state and federal, to promote collective bargaining in the interest of industrial peace. In Abood v. Detroit Board of Education, 431 U.S. 209, 222 (1976),*

*Abood is distinguished from the case herein by the fact that the Michigan statute authorized an agency shop arrangement requiring local government employees to pay union dues. The government policy at bar in no way restricts the associational rights of workers, public or private.

this Court noted, citing Railway Employees' Department v. Hanson, 351 U.S. 225 (1956), and Machinists v. Street, 367 U.S. 740 (1961), that union membership invariably interferes with the member's associational rights in many respects, but noted that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."

This Court has declined to consider arguments, such as that raised herein, which have not been pleaded or litigated below but are first raised upon appeal to this

tribunal.* Miree v. DeKalb County, 433 U.S. 25, 33-34 (1977); Tennessee v. Dunlap, 426 U.S. 312, 316 ftnt. 3 (1976). Moreover, the petitioners clearly do not have standing to litigate speculative violations of the First Amendment rights of their employees who are not parties to this suit. Warth v. Seldin, 422 U.S. 490 (1975).

* The effect of New York General Municipal Law §103 providing for the award of contracts to the lowest responsible bidder has also been first raised upon this application by amicus National Right to Work Legal Defense Foundation (Amicus Brief at p. 5). Such argument should not be considered at this time since it has not heretofore been advanced by the petitioners to support their alleged right to bid and requires the interpretation of state law. Similarly, the suggestion by amicus curiae petitioner National Association of Manufacturers that anti-trust laws may be violated by the policy at issue should also be disregarded as such alleged violations were never the subject of this suit. Both City of Lafayette v. Louisiana Power & Light Co., 46 U.S.L.W. 4265 (March 29, 1978) and Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975), concerned violations of federal anti-trust laws and are not supportive of the instant petition.

POINT III

THE MUNICIPAL POLICY RESTRICTING BIDDING ON CERTAIN PRINTING CONTRACTS TO UNION SHOPS IS NOT PRE-EMPTED BY FEDERAL LAW.

In Abood v. Detroit Board of Education, supra, 431 U.S. 209, 223, this Court stated unequivocally: "The National Labor Relations Act leaves regulation of the labor relations of state and local governments to the States." Presumably, if the federal scheme of labor-management regulation permits a state government to contract an agency shop agreement for its own employees, a policy such as that at issue, which merely sets a condition upon private bidders for public contracts and does not directly affect their employees at all, cannot be subject to federal pre-emption under 29 U.S.C. §157.

Moreover, it is submitted that federal law is intended to regulate actual labor-management and union-member disputes between employees and their employers and unions. The NLRA was not intended to regulate any and all aspects of local policy which may have some relationship to organized labor and collective bargaining, particularly when that policy does not involve inter-state commerce. It is "conduct" or "activities" in the nature of unfair labor practices that are the subject of federal pre-emption, not local government policies intended to further both local and federal purposes. Cf., Amalgamated Association of Street, Electrical Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274 (1971) (particularly dissenting opinion of White, J. at 317-318); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

The Court of Appeals here found that, in the absence of any indication that the practice at issue in any way alters the collective bargaining relationship within nonunion shops, "there is no need to determine whether Congress intended that federal labor law preempt those local practices which do alter collective bargaining relationships" (10a). The Court correctly held that the policy at issue does not require any employee to join a union and is not, therefore, pre-empted by Section 7 of the NLRA.

CONCLUSION

The petition for a writ of certiorari should be denied.

July 12, 1978

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1625

IMAGE CARRIER CORPORATION, HOUSE OF LITHOGRAPHY, INC., ASSOCIATED LITHO AND LETTERING SERVICE, INC.,

Petitioners,

v.

EDWARD I. KOCH, MAYOR OF NEW YORK CITY, *et al.*,

Respondents.

MEMORANDUM OF RESPONDENT-INTERVENOR IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether a rational basis, required by the Equal Protection Clause of the Fourteenth Amendment, exists for Respondents' requirement that only union printers may bid for certain printing jobs.

Statement

This litigation concerns three printing companies with a total of four employee printers who are foreclosed from bidding for certain printing jobs by New York City, several municipal agencies and the Board of Education (a New York State agency) because of their non-union status.

The Second Circuit, reversing the finding of the District Court that no rational basis exists for the Respondent agencies' union label requirement and reversing the District Court's judgment of injunction, found that a rational basis does exist for the Respondent agencies' union label requirement.

ARGUMENT

The decision below is clearly correct.

This Court in *National League of Cities* v. *Usery*, 96 S.Ct. 2465, held that the right of each state to determine its own wage policy is an "undoubted attribute of state sovereignty" and declared unconstitutional the 1974 amendments to the Fair Labor Standards Act extending its minimum wage provisions to employees of states and their local subdivisions. Since a state has the power to act so as to *depress* the minimum wage paid for performance of state work, then surely another state has the power to act so as to seek to *uphold* the prevailing union scales, the wages and the terms and conditions of employment of persons who perform state work.

The Second Circuit, believing that sufficient rational basis for Respondents' policy exists in its fostering of collective bargaining, found that it need not question the District Court's factual finding that the challenged union label classification does not rationally further the pur-

pose of insuring that the prevailing wage rates be paid to employee printers working on municipal printing jobs. Since states have undoubted sovereignty with respect to wage policy, the degree of success which states achieve in implementing their policy is not a proper concern of the courts.

New York City may act to foster collective bargaining and did so in this case.

The Second Circuit having found that the Mayoral order restricting bidding to union printers had a purpose of fostering collective bargaining, Petitioners contend (p. 10) that "Such an imputation of purpose by the Second Circuit finds no support in the record.". What record support is needed for a finding that a restriction of bidding to union printers fosters collective bargaining? Surely such restriction could not fail to foster collective bargaining, and patently must be deemed to have a purpose of fostering collective bargaining power whenever imposed.

A municipality's acts which may have an economic impact which fosters collective bargaining are not made unlawful because of such impact. The Petitioners cite no case in support of their contention (pp. 12-13) that a municipality's act which may have an economic impact upon unionization is unlawful. The Petitioners state that the federal decisional law on this subject is "unsettled". Such decisional law in fact is virtually non-existent apart from the instant case.

There is no important question of law.

The questions presented by the Petitioners (at p. 2) are not genuine questions.

The first question presented by Petitioners—"Whether a municipality may arbitrarily preclude non-union printers from bidding on and being awarded city printing contracts . . ." assumes that such preclusion is "arbitrary". The Second Circuit found that such preclusion met the rational basis test applicable to equal protection cases involving economic matters, hence is not "arbitrary". This is a factual finding and does not raise any question of law.

The second question—whether the Congress which enacted the National Labor Relations Act "intended that a municipality be permitted to promulgate a policy, the effect of which is to force employees to affiliate with a labor organization in order for their employer to be awarded certain municipally funded contracts?"—patently is other than genuine. The National Labor Relations Act explicitly makes all duties, restrictions and prohibitions contained therein inapplicable to all governmental bodies. 29 U.S.C. 152(2).

Furthermore, the National Labor Relations Act imposes no restrictions or duties upon any organization except with respect to that organization's own employees and to unions which represent or seek to represent them.

The Petitioners incorrectly assert (p. 9) that the decision below conflicts with this Court's decisions restricting the exercise by local municipalities of police power. The decision below says nothing whatever about police power. Even if this were a "police power" case, the decision below would not conflict with any decision by this Court, because it is a finding that the Respondent agencies in fact have a rational basis for doing the acts complained of, hence do not violate the Equal Protection Clause. Since this Court never has ruled upon a similar factual question, there does not exist any decision by this Court with which the decision below could possibly conflict.

The decision of the Second Circuit does not conflict with any 'pre-emption" decision of this Court.

The Petitioners, having raised the pre-emption issue for the first time in the appeal to the Second Circuit, assert (pp. 13-15) that the decision below conflicts with decisions of this Court relating to the pre-emptive effect of the National Labor Relations Act over non-federal regulation. Petitioners err. The National Labor Relations Act sets forth the duties of employers to their employees and to unions, and the duties of unions to employers whose employees they represent and to the employees of those employers. The National Labor Relations Act imposes no restriction whatsoever against any act of any governmental body, and imposes no duty whatsoever applicable to any governmental body. 29 USC 152(2).

Petitioners' citations of *Nash* v. *Florida Indus. Commn.*, 389 U.S. 235 (1967) and *Connell Constr. Co., Inc.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975) are not in point. In *Nash* this Court held that a state may not interfere with the enforcement machinery of the National Labor Relations Board by withholding unemployment benefits from persons solely because they filed unfair labor practice charges against their employer with the National Labor Relations Board. In *Connell* this Court held that, since the National Labor Relations Act authorizes unions to picket for union contracts which eliminate wage competition in the construction industry, a state anti-trust law prohibiting restraint of wage competition cannot nullify such union contracts. Neither *Nash* or *Connell* may reasonably be interpreted to vitiate all local government regulation merely because a provision of the National Labor Relations Act may have a tangential effect in the area regulated.

The granting of certiorari in *New York Telephone Company, et al.* v. *New York State Department of Labor, et al.* No. 77-961, does not justify granting certiorari here.

The Petitioners erroneously assert (pp. 13-14) that the Second Circuit relied upon *New York Telephone Company* as a precedent for its conclusion that the National Labor Relations Act does not pre-empt defendants' actions. The Court below merely referred to *New York Telephone Company* as a Cf. reference (p. 10a) at the conclusion of the Court's discussion of the pre-emption issue. In *New York Telephone Company* the Second Circuit rejected the employer's argument that Congress did not intend that the several states be permitted to grant unemployment compensation to strikers at the expense of the struck employer, thereby interfering with the collective bargaining process. The instant case does not involve interference with the collective bargaining process.

The briefs of amici curiae.

All three movants for leave to file briefs espouse the proposition that every employee should have the freedom of choice to refrain from joining a union. All three movants express concern that the economic effect of the decision below is to inhibit such freedom of choice. All three movants fail to mention that our national labor policy, since the National Labor Relations Act was enacted in 1935 (Wagner Act), has had a much greater inhibitory effect upon employee freedom to refrain from joining a union than has the decision below. The movants also fail to mention that the National Labor Relations Act as amended in 1947 (Taft-Hartley Act) leaves to each state the right to determine the extent to which an employee

working within its borders has a right to refrain from joining a union and keep his job.

The Wagner Act enabled employers who engage in interstate commerce to become lawful closed shops pursuant to collective bargaining. As amended by the Taft-Hartley Act, our national labor policy no longer permits employers engaged in interstate commerce to operate as closed shops but permits employers to become union shops, and authorizes each state to make union shops within its borders illegal, as follows:

> "(b) Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 USC §164

Twenty states have made union shops illegal. Other states, with different policies relating to freedom of choice to refrain from joining unions, such as New York State, permit all employers within their borders who do not engage in interstate commerce to operate as closed shops. The majority of our states authorize employers to operate union shops—but not closed shops—whether or not they engage in interstate commerce.

All three movants in effect here seek a ruling and elicit supportive dicta which would disrupt the existing federal system, pursuant to which each state has substantial sovereignty governing the extent to which it chooses to foster collective bargaining and/or to foster freedom of each employee to refrain from joining a union.

Since no Circuit Court has held that the equal protection clause prohibits local government action that in-

hibits the freedom of an individual's choice of refraining from joining a union, directly or indirectly—let alone as a tangential effect of an economic activity as in the instant case—the movants are asking this Court to make a drastic change of our national labor policy in the guise of seeking an upholding of our national labor policy.

The brief of the National Association of Manufacturers (NAM).

NAM erroneously states that the decision below "is at variance with this Court's pronouncements" with respect to the preemptive effect of the National Labor Relations Act. More specifically NAM urges (at p. 7) that "The entire scheme of the NLRA is designed to insulate this decision-making process from unwarranted intrusions by labor or management and, although not specifically stated, it must necessarily follow that governmental bodies are likewise precluded from interfering with an employee's exercise of this right. *Cf. Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 149-150 (1976)."

In *Lodge 76* this Court held that the Wisconsin Supreme Court may not enjoin a union's concerted refusal to work overtime where the National Labor Relations Board took jurisdiction, dismissed the charge and held that the union should not be enjoined. In the instant case it is undisputed that the National Labor Relations Board could not conceivably exercise jurisdiction of any aspect of this matter.

Noting that this Court has stated that where an area of labor relations requiring national uniformity remains unregulated, the Congress may then have intended that

"the free play of economic forces" should control *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971), NAM argues that local government bidding procedures may not interfere with the forces of the market place. The Congress expressly legislated, however, that the freedom not to join a union was *not* an area requiring national uniformity. (29 U.S.C. 164, supra p. 7) Furthermore, the practice by many local governments of employing only non-union contractors discourages collective bargaining just as surely as New York City's practice encourages collective bargaining. In any event these bidding procedures are but a part and parcel of the economic forces of the market place whose play affects the choices of contractors and of their employees.

The NAM next urges (at p. 10) that the printer union label requirement is "wholly without rational nexus to a legitimate governmental objective", hence is repugnant to the equal protection clause. NAM argues that since the Mayoral Order of 1934 predated the New York State Labor Relations Act (of 1937), such Order could not have constituted a pronouncement made pursuant to the Labor Relations Act's purpose of fostering collective bargaining, hence "the Court's *ex post facto* explanation is not persuasive". Since, however, the Mayor's 1934 policy was reaffirmed by each succeeding New York City administration, the date of the first pronouncement is irrelevant.

NAM next argues that the 1934 Mayoral policy requires reexamination, gauged against contemporary standards, citing *Brown* v. *Board of Education*, 347 U.S. 483 (1954). The fostering of collective bargaining of course remains part of this nation's labor policy and constitutes an integral element of our contemporary standards.

The NAM relies (at p. 12) upon *Master Printers Association* v. *Board of Trustees of Junior College District*

No. 508, 356 F. Supp. 1355 (N.D. Ill. 1973) in support of its attack upon the legality of "restricting the award of public contracts to only unionized firms". In *Master Printers* the District Court denied the defendant's motion to dismiss, did not mention the Fourteenth Amendment or the concepts of equal protection or due process, and relied upon Illinois State cases, referring to their ancient vintage and concluding that "indications are that they still represent the law in this State". Whether restricting of public contract bidding to unionized firms violates the laws of some of the several states of course is not a concern of this Court in this case.

NAM finally states (at pp. 13-14) that the policy which the Second Circuit refused to enjoin may violate the Sherman Act, and asserts that the Mayoral Order works to restrict the award of the City's printing contracts to a "small fraction of its eligible bidders". Assuming arguendo that every non-union printing firm in New York City otherwise is an eligible bidder, at least 42% of the City's printers are eligible to bid now, and the others are eligible as soon as they choose to unionize. Whether the action of a municipality is subject to the Sherman Act dedends upon whether it reflects state policy. *City of Lafayette* v. *Louisiana Power and Light Co.*, 46 U.S.L.W. 4265 (March 29, 1978). If the Sherman Act is being violated by Respondents' union label requirement, both the United States Attorney and the Petitioners of course are free to proceed thereunder.

The brief of the National Right to Work Legal Defense Foundation.

The amicus curiae brief of the National Right to Work Legal Defense Foundation advocates the "legal rights of employees". No employee has joined this action. This

brief also contends that the First Amendment guarantees a "constitutional right of non-association", and cites *Evans* v. *Newton*, 382 U.S. 296 (1966) and *Illinois State Employees Union* v. *Lewis*, 473 F.2d 561 (7th Cir. 1972, *cert. denied*, 410 U.S. 928 1973). *Evans* is irrelevant here. The only reference in *Evans* to a right of non-association in this Court's dictum that a private golf club "restricted to either Negro or white membership" is an instance of expression of freedom of association. *Illinois State Employees Union* likewise is irrelevant here, having involved a discharge of a state employee for refusing to change his allegiance from Democratic to Republican.

The contention that a labor policy which fosters collective bargaining violates the First Amendment is frivolous. The First Amendment never has been held to guarantee the freedom *not* to associate. Were the law otherwise, the National Labor Relations Act's encouragement of collective bargaining and its authorization of "union shops" itself would violate the First Amendment.

The brief of the Center on National Labor Policy.

The brief of the Center on National Labor Policy focuses upon the affixing of union labels to flat form sheets printed for the Respondents and cites *Wooley* v. *Maynard*, 430 U.S. 705 (1977). In *Wooley* the issue on appeal was whether the State of New Hampshire may Constitutionally enforce criminal sanctions against George and Maxine Maynard, followers of the Jehovah's Witnesses faith, who covered the motto "Live Free or Die" on their passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs. The union label is a barely visible mark which may be

obliterated by the stroke of a pen on any sheet of paper prepared for New York City without fear of criminal sanction. In any event said union label does not, as the brief amicus asserts, "tell(s) all the world that the government does not permit non-union laborers to work on the printing of such forms" but merely advises persons aware of the label's significance that union labor produced that particular sheet of paper.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated: June 26, 1978

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IN THE

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v.

EDWARD I. KOCH,
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Respondents.

PETITIONERS' REPLY BRIEF TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITIONERS' REPLY BRIEF TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT

The Respondents and Respondent-Intervenor raise numerous arguments in opposition to this Court's granting of certiorari. The majority of these arguments are without substance and adequately refuted in the Petition for a Writ of Certiorari. However, the Respondents and the Respondent-Intervenor raise certain arguments which only serve to obfuscate the real issues presented in the case. In order to clarify any misconception raised by these arguments, this Reply Brief is respectfully submitted.

I. Respondent-Intervenor's Argument Concerning The Exclusion Of Local Governmental Bodies From The Purview Of The National Labor Relations Act Is Irrelevant To This Case.

In its brief, Respondent-Intervenor attempts to side-step the substantial issue of federal pre-emption raised by Respondents' restrictive contracting practices by concluding that the National Labor Relations Act imposes no duties or restrictions upon the actions of governmental bodies (RI-4, 5).[1] Such a conclusion is a non-sequitor and wholly irrelevant to the issue of federal pre-emption before this Court.

The issue of federal pre-emption raised in this case is simply whether Respondents' restrictive contracting practices infringe upon the right of private sector employers and employees to establish and maintain a non-union employment relationship, a right guaranteed by the National Labor Relations Act. Obviously, the action of governmental bodies vis-a-vis their own employees fall outside the purview of the National Labor Relations Act. However, the restrictive governmental action involved herein is directed against the private employment relationship between printers and their employees, specifically inhibiting these private sector employees from exercising their federally protected right to refrain from union representation.

A more classic case of a state's intrusion upon a federally protected right is difficult to imagine. It is conceded by the Respondents that the award of most city printing contracts is restricted to only those companies who are authorized to affix the union label. The actual effect of these arbitrary restrictive practices is clear. Petitioners and their employees are forced to unionize to the deprivation of their employees'

[1]Numbers in parentheses prefaced by "RI" refer to pages of Respondent-Intervenor's Memorandum In Opposition To Petition For Certiorari.

federally protected rights if they desire to obtain the economic benefit of being able to perform city printing contracts. In essence, the City is penalizing the employees of non-union employers for exercising the rights conferred on them by federal law.

The Respondents' union label policy clearly conflicts with federal labor law. As this Court has previously stated:

> When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by §7 of the National Labor Relations Act . . . , due regard for the federal enactment requires that state jurisdiction must yield. *To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requiremetns imposed by state law. Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 139 (1976) (emphasis added) (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)).

Unquestionably, the Respondents' restrictive contracting practices substantially impair the exercise of the right to establish a non-union working relationship — a right "plainly within the central aim" of the National Labor Relations Act.

II. Respondent-Intervenor's Argument Relating To A State's Ability To Insure The Payment Of Prevailing Wages Is Irrelevant To The Issues Presented To The Court In This Case.

In its brief, Respondent-Intervenor relies upon *National League of Cities v. Usery*, 426 U.S. 833 (1976), for the proposition that:

> "Since the state has the power to act so as to depress the minimum wage paid for performance of state work, then surely another state has the power to act so as to seek to uphold the prevailing union scales, the wages and the terms and conditions of employment of persons who perform state work." (RI-2)

Such reliance is wholly misplaced since it attempts to transform a decision of this Court concerning the right of sovereign states to set wage policies for governmental employees into a decision granting the right to infringe on private employment relationships in derogation of established federal labor policy.

By attempting to characterize this case as one concerning a state's right to promulgate and enforce prevailing wage rates, the Respondent-Intervenor completely distorts the real issue before this Court; that is, whether the Respondents can arbitrarily preclude open-shop printing companies in the City of New York from bidding on and being awarded City printing projects financed with New York taxpayer monies solely because of their status as open-shop printers. Contrary to Respondent-Intervenor's assertion, this is simply not a prevailing rate case, but a case dealing with total exclusion of open-shop printers and their non-union employees from performing City work. Petitioners' Complaint attacked the City's union label policy as implemented and enforced through Respondents' bid solicitation restrictions. Nowhere in these bid solicitations is prevailing wage mentioned.

Union status is not the litmus test of whether an individual printer is paying his employees the "prevailing rate". As the record below indicates, open-shop printing companies in New York often pay rates comparable with those of union shops. Moreover, as the record further reflects, New York State has a prevailing rate law, legislation separate and distinct from the union label policy which the City is here attempting to defend.

The record below evidences no attempt by Respondents to preclude Petitioners from bidding on City contracts because of their failure to meet any prevailing wage criteria. Petitioners were prohibited from bidding on state work solely due to their status as open-shop printers, regardless of their wage and benefit schedules.

III. Governmental Action Fostering Collective Bargaining Must Be Declared Invalid Where Such Action Infringes Upon The Federally Protected Right To Establish A Non-union Working Relationship.

Both Respondents and Respondent-Intervenor strenuously argue that state action which has the effect of fostering collective bargaining is a legitimate governmental purpose where such action assures industrial harmony in what *was* a traditionally "strike prone" industry (R-2, 3, 8, 15; RI-3).[2] Even assuming arguendo that Respondents have a legitimate concern in fostering and promoting collective bargaining, such concern must, in compliance with federal labor policy, preserve for employees and employers alike, the option to maintain their open-shop relationship. In the absence of such recognition, a policy of "fostering" and "promoting" collective bargaining is metamorphosized into a policy "foisting" and "promulgating" collective bargaining.

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[2]Numbers in parentheses prefaced by "R" refer to pages of Respondents' Brief in Opposition To Petition For Certiorari.

It is also fallacious to assume that the economic conditions of 1934 giving rise to the promulgation of the Mayoral Order are consistent with those which exist today. Quite simply, the pre-1934 conditions do not exist, and the possibility that the "industrial strife" endemic to printing industry labor relations prior to the Mayoral Order will return to the industry should Respondents' restrictive practices be barred is, at best, highly speculative.[3]

A police power measure, although constitutionally valid when enacted, may become arbitrary and, therefore, unconstitutional by the operation of later events. *Abie State Bank v. Bryan*, 282 U.S. 765, 772 (1931). Even if it is conceded that the union label policy accomplished a rational purpose and was therefore constitutionally valid at the time of its adoption, it is clear that today, the dichotomy between union and non-union status with respect to the award of public contracts is ill-suited to any conceivable governmental purpose. Whether its purpose is perceived to be the upgrading of economic conditions in the City's printing industry or the promotion of "industrial peace", it is clear that Mayor LaGuardia's Order has outlived its usefulness and today serves only to create an unwarranted monopoly among a minority of City printing establishments. Depression economic conditions no longer exist and the Congress, with the passage of the Wagner Act in 1935, established that private sector labor management relations in this country are to be governed by a comprehensive scheme of federal regulation.

[3]It should be pointed out that there is no evidence in the Record that the printing industry in New York City was a particularly strike-prone industry, or that the open-shop segment of the industry was more strike-prone than the union sector. Indeed, it is common knowledge that the converse has historically been the case. Certainly, the strike activity plaguing the New York City printing industry today is due almost totally to the breakdown of collective bargaining where union relationships have already been established and not due to organizational strikes as Respondent-Intervenor implies.

The failure of this Court to declare invalid Respondents' restrictive contracting practices will result in a serious breach of the federal labor relations regulatory scheme; a scheme this Court has scrupulously protected from the disruptive effects of State intrusions. Such a breach, if countenanced, will be a clear signal to labor organizations in all industries, that what might be unobtainable through the collective bargaining process can be garnered by Executive Fiat. If this is to be the case, the basic guarantees of the National Labor Relations Act may well be rendered meaningless.

CONCLUSION

This Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Washington, D.C.

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PETITION FOR CERTIORARI
TO THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1625

IMAGE CARRIER CORPORATION,
Appellants,

v.

ABRAHAM D. BEAME, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FROM THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF AMICUS CURIAE ON BEHALF OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC., URGING GRANT OF CERTIORARI

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15 May 1978

PETITION FOR CERTIORARI
TO THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

IMAGE CARRIER CORPORATION,
Appellants,

v.

ABRAHAM D. BEAME, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FROM THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF AMICUS CURIAE ON BEHALF OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC., URGING GRANT OF CERTIORARI

MOTION

Pursuant to Rule 42 of the Rules of this Court, the Associated Builders and Contractors, Inc., hereby moves for leave to file the annexed brief amicus curiae, urging that a writ of certiorari be granted to review the decision of the Second Circuit Court of Appeals.

INTEREST OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC.

On December 30, 1977, the U. S. Court of Appeals for the Second Circuit reversed the U. S. District Court decision in this case. The decision dealt with the New York Executive Order of 1934 which confines bids for City printing contracts to union printers only. We urge that the Order denies nonunion printers their rights as guaranteed by the equal protection clause of the 14th Amendment to the United States Constitution and that the decision of the U. S. District Court should be upheld.

The Associated Builders and Contractors, Inc., the moving party herein, is a national trade association of 12,000 companies which believe in the "merit shop" principle under which bidders for construction are able and dedicated to practice free and open competition in the American marketplace. However, the AFL-CIO Building Trades and some independent unions do not advocate or practice such market freedom because they do not want union members working alongside nonunion workers. Hence, among other means, they utilize and protect market restraints, as involved in this case, to keep their members and others who may hire them, from free and open competition. Among these restrictive measures is the Municipal decree herein, where the effect of the Executive Order inhibits and prevents open bidding and free competition.

However, the ultimate decision in this case is not only vital to nonunion printing companies and their employees, but to all private sector employers and their employees, including our members. It involves whether we all shall participate in free and open competition not only in New York City but in any American marketplace.

We are enthusiastic that the appellants seek to seriously and skillfully defend their interests. Nonetheless, the Associated Builders and Contractors, Inc., aims by its filing to underscore that this case is not only of relevance to a narrow printing industry interest, but has wide-ranging implication and application.

These same issues involve federal questions and have special and important bearing on all American free enterprise; therefore, the Court will be applying sound judicial discretion in granting a writ of certiorari and reviewing these vital questions involved. We elaborate on these matters herein.

Respectfully submitted,

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15 May 1978

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BEFORE THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

IMAGE CARRIER CORPORATION,

Appellants,

v.

ABRAHAM D. BEAME, *et al.*,

Appellees.

ON APPEAL FROM THE
SECOND CIRCUIT COURT OF APPEALS

BRIEF AMICUS CURIAE ON BEHALF OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC. URGING GRANT OF A WRIT OF CERTIORARI

The Associated Builders and Contractors, Inc., files this brief amicus curiae in support of appellants, Image Carrier Corporation, urging this Court to grant certiorari to review the decision of the U. S. Second Circuit Court of Appeals.

INTEREST OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC.

The interest of the Associated Builders and Contractors, Inc., in participating as amicus curiae in this case is set forth above.

ARGUMENT

This case involves a matter arising under the United States Constitution respecting the constitutional repugnancy and effect of a municipal executive order; Shultis v. McDougal, 32 S.Ct. 704, 706; 225 U.S. 561, 569. (See also 28 U.S.C.A. 1254(2); United Gas Pipeline Company v. Ideal Cement Co., 1962, 82 S.Ct. 676, 369 U.S. 134.) By grant of writ and review, the Court will apply constitutional law to effect a remedy. Feibelman v. Packard, 1883, 3 Sup. Ct. 289, 109 U.S. 421, 27 L.Ed. 984.

The grant to Congress in the commerce clause of the Constitution was unaccompanied by an explicit limitation on the powers of the States or their municipalities over commercial matters. However, the U. S. Supreme Court has held that the clause impliedly denies the right of States (or their subclassifications) authority to impose unreasonable and unrational burdens on interstate commerce. This is especially the case where the subject matter on which they intend their laws to operate is national in character and requires uniformity of regulation. Leisy v. Harden, 135 U.S. 100, 119-20 (1890).

"Interstate commerce" includes all the "component parts" and "essential elements of commercial intercourse among the States." Foster Fountain Packing Company v. Haydel, 278 U.S. 1, 10 (1928).

The New York City ordinance deprives the right of all citizens as beneficiaries of the degree of care required of Trustees (councilmen) of the City acting as fiduciaries for the City's responsibility. Public bidding laws are to ensure that contracts are awarded to the lowest responsible bidder. (General New York Municipal Law; Section 103, NY State (1953).) These regulations, as any others, are to benefit the public, not any of the bidders.

The ordinance should not be used to promote the interests of any labor organization in coercing printing shops, or anyone, including bidders who might cause infringement under Section 7 of the National Labor Relations Act, to unionize workers in order to qualify for city contracts.

The appellees' restrictive "bid union only" policy is not reasonable or proximately related to the "special" job which must be performed.

When local economic regulations are challenged as violating the equal participation clause of the United States Constitution, the Court will inquire into the particular executive order determinations and discriminations, to see if the challenge is rationally related to the legitimate State or municipal concerned. Dandridge v. Williams, 397 U.S. 471 (1970). We point out that the record herein would hardly justify a municipal concern and interest in forcing workers to belong to any union (see Section 7 of the National Labor Relations Act); to compel contractors to pay higher wages

than free and competitive bidding would cause; or that the ordinance directly relates in proximate cause to performance of high quality work. Therefore, it is not rational.

The U.S. District Court heard the evidence. Its decision should be affirmed and the U. S. Circuit Court of Appeals decision which reversed their decision should be reversed.

A writ of certiorari should be granted.

MOTION FILED
MAY 16 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1625

IMAGE CARRIER CORPORATION, et al., *Petitioners,*

-against-

ABRAHAM D. BEAME, Mayor of New York City, et al., *Respondents.*

HOUSE OF LITHOGRAPHY, INC., et al., *Petitioners,*

-against-

ABRAHAM D. BEAME, Mayor of New York City, et al., *Respondents.*

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No

IMAGE CARRIER CORPORATION, et al., *Petitioners,*

-against-

ABRAHAM D. BEAME, Mayor of New York City, et al., *Respondents.*

HOUSE OF LITHOGRAPHY, INC., et al., *Petitioners,*

-against-

ABRAHAM D. BEAME, Mayor of New York City, et al., *Respondents.*

MOTION OF AMICUS CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The National Right to Work Legal Defense Foundation respectfully moves pursuant to this Court's Rule 42 for leave to file its brief *amicus curiae* in support of the Petition for a Writ of Certiorari. Consent was sought from all parties. Image Carrier Corporation and the City of New York gave its consent to the filing of this brief. The Intervenor has not. The consents of the Petitioner and the Respondent have been filed with the Clerk.

The accompanying brief urges this Court to grant the Petition for a Writ of Certiorari to the United States Court of Appeals in the matter of *Image Carrier Corporation* v. *Beame*, 567 F.2d 1197 (2nd Cir. 1977).

The National Right to Work Legal Defense Foundation is a nonprofit, tax exempt organization, existing for the sole purpose of protecting the right to work, freedom of association, and other fundamental liberties of ordinary working men and women where these basic rights are infringed by unconstitutional or other illegal practices in connection with compulsory union membership.

The National Right to Work Legal Defense Foundation is vitally interested in aiding all employees whose human and civil rights are threatened or abridged through the injustices arising out of compulsory unionism arrangements. Thus, it is concerned with the protection of the legal right of an employee to work for an employer who has no contract with a union because that employee, along with his fellow employees, does not wish to belong or pay dues or a service fee to a union for unwanted representation.

When a public agency is permitted to restrict the awarding of contracts for public work to companies with union contracts, then it is apparent that the nonunion employee who works for the nonunion employer is adversely affected by this exclusion. He is in actuality denied employment opportunities because of the exercise of his right to remain nonunion.

Accordingly, the National Right to Work Legal Defense Foundation representing the interests of nonunion employees requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No

IMAGE CARRIER CORPORATION, et al., *Petitioners,*

-against-

ABRAHAM D. BEAME, Mayor of New York City, et al., *Respondents.*

HOUSE OF LITHOGRAPHY, INC., et al., *Petitioners,* et al., *Respondents.*

-against-

ABRAHAM D. BEAME, Mayor of New York City,

BRIEF OF *AMICUS CURIAE,* THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTEREST OF *AMICUS*

The National Right to Work Legal Defense Foundation is a nonprofit, tax exempt corporation, the sole purpose of which is to provide free legal assistance to employees whose civil rights have been abridged as a result of the injustices arising from compulsory unionism. This case has great significance to all nonunion employees in every industry where a public works project could be limited to union member employees. The interests of the *amicus curiae* are set forth in detail in the preceding Motion for Leave to File this Brief.

ARGUMENTS IN SUPPORT OF GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. Importance of This Case.

This case holds great significance to each and every employee of a nonunion printer in New York City. These employees, in exercising a right to work without union membership, are in actuality being punished for that action in that their employer is being refused the right to do work for the City of New York.

The right of an individual to chose his own private associations has been firmly established in the fabric of our constitutional law. *See e.g. NAACP* v. *Button,* 371 U.S. 415 (1963); *Scales* v. *United States,* 367 U.S. 203 (1961); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U.S. 293 (1961); *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960); *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449 (1958).

Membership in a labor union obviously entails an association of the most literal variety. And as the Court of Appeals set forth in *Hanover Township Federation* v. *Hanover Community School Corp.,* 457 F.2d 456 (7th Cir. 1972), from the constitutional perspective, "there is no reason to distinguish a union from any other association." Just as there is a constitutional right of association, i.e., the right of the individual to organize and join labor organizations,[1] there is also a constitutional right of non-association. *See Evans* v. *Newton,* 382 U.S. 296 (1966) and *Illinois State Employees Union* v. *Lewis,* 473 F.2d 561 (7th Cir. 1972), *cert. denied,* 410 U.S. 928 (1973). Consequently, it follows

[1] *Thomas* v. *Collins,* 323 U.S. 516 (1945) and *Orr* v. *Thorpe,* 427 F.2d 1129 (5th Cir. 1970).

that an employee who chooses not to associate with a labor organization is entitled to the same constitutional protections as the employee who exercises his freedom to join such a group.

If the decision in the Court of Appeals is allowed to stand, employees would be forced to choose the union as their representative in order to work on public printing jobs for New York City. Furthermore, their employer could only obtain or bid on contracts from the city, if that employer forced union representation on the employees.

2. The Court of Appeals Erred in Failing to Recognize the Legal Rights of Employees.

The practices of the City of New York and the mayor's office in restricting the bidding and awarding of contracts to union organized printers, conflicts with those rights guaranteed to all employees by Section 7 of the National Labor Relations Act, 29 U.S.C. Section 157. Section 7 provides:

> Employees . . . shall also have the right to *refrain from any or all such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 158(a)(3) of this title. (Emphasis added.)

In the case before this Court, the City will only award printing contracts to those companies who are authorized to affix the union label. Those employees, who work for an employer and who have chosen not to join or be represented by a labor organization, are denied the opportunity to work on projects arising under these contracts because their employer is denied the opportunity to bid or accept a contract financed by

public tax money. This prohibition arises solely as a result of the employees' exercise of their protected rights under Section 7. The opinion of the majority of the Court of Appeals is completely without basis when it is stated that the effect on the exercise of the employees' rights is minimal under the application of the City's policy toward granting contracts to those printers who can affix the union label.

3. The Union-Only Policy Is Totally Unrelated to Any Legitimate State Interest.

As noted by the dissenting opinion of Judge Anderson, the evidence in the case points to a violation of the "equal protection clause" of the Constitution in that there is no legitimate, articulated state purpose for differentiation between the union and nonunion printing firm. *McGinnis* v. *Royster,* 410 U.S. 263 (1973). The test as set forth by this Court in *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970) is "that the state's action be rationally based and free from invidious discrimination." The policy of the City in this case clearly does not meet this test. This Court reaffirmed that test in *New Orleans* v. *Dukes,* 427 U.S. 297 (1976).

The stated purpose of the executive order establishing the union label award of contracts grew out of the high unemployment during a severe depression. In the preamble to the Executive Order on April 12, 1934, it was said:

> Resolved that in order to lend the greatest measure of aid and assistance during the present economic depression to those citizens of our city engaged in the various branches of the printing industry, the following provisions be made a part of each and every contract and open market order issued by the Board of City Record.

It would appear that this policy was enacted to alleviate the high rate of unemployment that was present in the printing industry in 1934 in New York City. The evidence is clear that there is no further explanation or purpose set forth in any other executive decision continuing this restrictive practice, and no mention has ever been made of the desire to promote collective bargaining by this "union shop only" policy.

New York Labor Law, Section 77 is designed to promote collective bargaining, but contained in that section is no provision that would preclude a nonunion employer from bidding on public works contracts. The New York Labor Relations Act was not passed until 1940—six years after the issuance of the prounion resolution at issue in this case. In fact, New York General Municipal Law, Section 103, states a policy that contracts for public works, including printing contracts, are to be awarded to the lowest responsible bidder. That bidder has been held to be nonunion as well as union shop. *Apex Indust. Const. Corp.* v. *Village of Lake George,* 31 A.D.2d 670, 295 N.Y.S.2d 548 (1968), and *Long Island Signal Corp.* v. *County of Nassau,* 51 Misc.2d 320, 273 N.Y.S.2d 188 (1966). Thus, it would follow that agencies of the State of New York could not lawfully refuse to award a contract to a bidder solely because that bidder employed nonunion workers. In fact, the only criteria to be used must be "the lowest responsible bidder." If "the lowest responsible bidder" is the only criteria to be used, then there is equal protection of the laws because the rights of all persons rest upon the same rule under the circumstances, and there is equality of opportunity. *Walker* v. *Board of Supervisors,* 224 Miss. 801, 81 So.2d 225, *cert. denied,*

350 U.S. 887 (1955). But to arbitrarily base the award of contracts on union affiliation would clearly be a violation of the equal protection clause.

In the case at bar, the City has never shown that the City's ban on the use of nonunion labor in performing certain public printing contracts bears any relationship to a state interest in collective bargaining or the promulgation of any labor policy of the state or city. It can serve no state or public interest for the City's regulations to promote the interests of labor organizations by forcing printing shops to unionize their employees in order to qualify for City contracts. Absent any public interest, the only qualifications that can be put on the bidding and awarding of contracts must be reasonably related to the job to be performed.

CONCLUSION

For the above reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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MOTION FILED
MAY 16 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1625

IMAGE CARRIER CORPORATION, *et. al., Petitioners*

v.

ABRAHAM D. BEAME, MAYOR OF NEW YORK CITY, *et. al., Respondents*

ALLIED PRINTING TRADES COUNCIL, AFL-CIO, *Intervenors*

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

IMAGE CARRIER CORPORATION, *et. al., Petitioners*

v.

ABRAHAM D. BEAME, MAYOR OF NEW YORK CITY, *et. al., Respondents*

ALLIED PRINTING TRADES COUNCIL, AFL-CIO, *Intervenors*

MOTION OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY FOR LEAVE TO FILE BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Center on National Labor Policy hereby respectfully moves pursuant to this Court's Rule 42 for leave to file its brief *amicus curiae* in support of the petition for a writ of certiorari. Consent was sought from all parties. The Mayor of New York City, *et. al.,* respondents, and the petitioners gave their permission. The intervenors did not. All of these documents have been filed with the clerk.

The accompanying brief urges this Court to grant the petition for a writ of certiorari to the United States Court of Appeals in the matter of *Image Carrier*

Corporation, et. al. v. *Abraham D. Beame, Mayor of New York City, et. al.*, 567 F.2d 1197 (2nd Cir. 1977).

Center on National Labor Policy is a national non-profit, non-partisan organization, chartered as a public interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers. Private pressure groups, such as organized labor groups, have a history of significant impact on the rights of the public, consumers, taxpayers, and workers. As this Court recognized in *Connell Construction, Co., Inc.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 625 (1975), union pressure "could result in significant adverse effects on the market and on consumers. . . ." When organized labor pressure is supported by a state government policy, as in the case at bar, significant questions are raised concerning the civil rights of other affected parties—the public, consumers, taxpayers, and workers.

The Center, as a public interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to collective rights of pressure groups such as labor unions. Where state policy gives an advantage to a private association through business favors, the state is answerable for the impact on the rights of individuals.

Because Center on National Labor Policy can bring to this case a diverse perspective not presently represented, the Center's participation can assist the Court in obtaining full consideration of public interest issues.

Accordingly, Center on National Labor Policy respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

IMAGE CARRIER CORPORATION, *et. al., Petitioners*

v.

ABRAHAM D. BEAME, MAYOR OF NEW YORK CITY, *et. al., Respondents*

ALLIED PRINTING TRADES COUNCIL, AFL-CIO, *Intervenors*

BRIEF OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTEREST OF *AMICUS*

Center on National Labor Policy is a national non-profit, non-partisan organization, chartered as a public interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers.

When organized labor pressure is supported by a government policy favoring employment of union members on government projects to the exclusion of non-

affiliated workers, significant constitutional questions are raised concerning the individual rights of other affected parties. The Center, as a public interest organization, believes that the individual rights of workers, taxpayers, consumers, and public citizens should be paramount to the collective privileges of pressure groups such as labor unions. Where state action undergirds the coercive power of such groups, the impact on the public interest may be substantial. Consequently, the Center's concerns about this impact are significant.

Further background and interests of *amicus* have been detailed in the preceding motion for leave to file this brief.

I. The Court Of Appeals Erred In Not Finding A Violation Of The First Amendment Where The Government Policy Of Requiring Union Plant Status As Prerequisite To Bidding On Certain Government Printing Contracts Discriminatorily Discourages Freedom To Join In, Or To Refrain From, Organizing Unions And Collectively Bargaining.

The court of appeals puts a gloss on national labor policies and so misconstrues their meaning as to allow forced association in violation of the first amendment. Over a strong dissent, 567 F.2d at 1203-06 and n.2 (Anderson J., dissenting), the court decided (2-1) that New York City discriminatory printing contract policy was protected by a national policy to "foster" collective bargaining and a state policy to "promote" collective bargaining. 567 F.2d at 1203. The majority mistakes the means for the end; collective bargaining was *not* the end sought to be promoted, but rather the "right of employees *freely* to organize" N.Y. Labor Law § 700 (McKinney 1977) (emphasis added). The state is hardly promoting *freedom* to organize when its avowed purposes are to *coerce* organizing and collective bargaining with economic might.

Even if forced collective bargaining were a proper state function, the majority opinion does not provide an adequate consideration of the individual rights offended to justify the discriminatory policy as required by *Wooley* v. *Maynard,* 430 U.S. 705, 715-16 (1977).

The First Amendment protects various forms of individual expression and concomitant associations. The Constitution does not allow abridgement of associational rights whether based on "political, *economic,* religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP* v. *Alabama,* 357 U.S. 449, 460, 461 (1958) (emphasis added).

Many workers express a preference to work non-union. They prefer not to be a part of a labor organization and they prefer to bargain independently for their employment contracts. If a worker evaluates his *economic* interests and determines that he prefers to make his own employment contract and not to throw his lot in with those workers who have organized and are bargaining collectively, the First Amendment protects that determination. The government may not make the *economic* determination for the worker. Rather, the state should refrain from coercing the worker so that he can make his decision by free choice.

The majority of the court of appeals suggests that the government policy might not actually be *effective* in coercing non-union workers into joining a union. 567 F.2d at 1203. But unconstitutional government policies are not left standing because they do not meet a measure of total effectiveness. Even that the government "has taken no direct action . . . to restrict the

right of petitioner's members to associate freely, does not end inquiry into the effect of the . . . order." *NAACP* v. *Alabama,* 357 U.S. 449, 461 (1958). Of course, the government here has taken action *directly* designed to promote labor union associations so inquiry should hardly be curtailed. Here the government action is designed to totally exclude non-union workers from government flat-form printing contracts. Consequently, the effect of closing the printing market for government flat-forms in a metropolis the size of New York City is strong government action and should hardly be treated so lightly as by the majority.

The majority also implies that "the total printing work available in and around New York City . . ." might be considered as reducing the effect of the government's anti-nonunion worker policy. 567 F.2d at 1203. It is error to imply that the availability of adequate work might leave standing a government policy offensive to the Constitution. Even if alternate work comprised an adequate printing market so that tangible factors such as plant capacity were equal as between non-union plants and union plants, the court could not claim that economic opportunity was equal. *See, eg., Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954) (Even where tangible factors of discriminatorily segregated facilities are equal, educational opportunities cannot be equal). This inequity must be so because union plants have access to the entire printing market while the government denies non-union plants access to the government flat-form portion of that market.

Just as in *Brown,* the government's action is a cancer which affects the whole city. Not only are non-union workers denied economic opportunities, but the tax-

payers and consumers of the city must bear any economic burden which results from the artificially reduced scope of competitive bidding. The additional affront to the broad public interest serves as an indication that the evil policy here deserves strict scrutiny on appeal.

Plainly, the government policy against non-union printing plants is a mighty thrust at economically coercing non-union worker association with labor organizations. This state activity is sufficiently offensive to require a close examination of the violation of First Amendment associational rights.

II. The Court Of Appeals Additionally Erred In Not Finding A Violation Of The First Amendment Where The Government Policy Of Requiring Affixation Of The Union Label To Government Flat-Forms Promotes A Policy Of Involuntary Association With Union Organizations In Violation Of The First Amendment.

The majority on the court of appeals treated in summary fashion the affixation of the union label. Fortunately, the Constitution requires a higher standard of review when the government uses its power to promote ideas. Any intrusion on the opposite ideas of others must be well justified. *Wooley* v. *Maynard,* 430 U.S. 705, 715-17 (1977). The government's requirement that the union label be affixed to flat-forms is an evil additional to its policy of discrimination against non-union printing workers. By putting the union label on its official forms, the government gives an open, official, and promotional approval to its discriminatory policy. The majority implies that the union label is merely craft-related. *See* 567 F.2d at 1203, n.19. No doubt the label is that used by printing unions. But at bottom, the label is not affixed unless the labor was all

union. The advertising and promoting of the union plant concept by way of the union label tells all the world that the government does not permit non-union laborers to work on the printing of such forms. Thus, the Court is not merely faced with government engaged in discrimination, but government openly proclaiming and promoting the discrimination.

Assuming, arguendo, that the discrimination itself were benign, the promotion of discrimination may not pass constitutional muster. For example, while a government grant to nazis to study nazism might somehow be valid, it is another matter for the government to put the nazi swastika on its forms. In doing so it promotes a private, non-governmental function which many of its private citizens who must use the forms do not wish to support or promote. At the same time, the swastika presented in concert with the coercive power of the governmental imprimatur on the forms can chill the First Amendment freedoms of citizens who have opposite ideas. Thus in *Wooley* v. *Maynard,* 430 U.S. 705, 715-17 (1977), this Court held that the government's promotion of the innocuous phrase "Live Free or Die" on government license plates used by private citizens was an affront to the First Amendment. Surely, the government's promotion of the union label on the millions of flat-forms that private citizens must use, laden as it is with a much broader affront to the public interest and individual rights cannot escape constitutional scrutiny.

While the majority opinion in the court below leaves the impression that requiring the printing union label on government forms is either merely craft-related or perhaps even beneficial, it is actually government sponsorship of worker coercion that offends the First Amendment rights of workers and the public, and demands an impartial review by this Court.

CONCLUSION

That concept of national labor policy which promotes freedom of choice by the worker is sometimes reflexively misconstrued to promote unionism over voluntary non-unionism. To the extent that a government would step into the workplace and makes the choice for the worker, the Constitution stands as a bar. By withholding government flat-form printing projects from non-union workers, the government here has overstepped its bounds. Compounding its offense, the government further extols the merits of discriminating against non-union workers by displaying the union label on such printing. This action may not be glossed over by a reviewing court as a harmless or even beneficial policy. It has serious implications detrimental to large segments of the public and deserves careful judicial scrutiny. Consequently, Center on National Labor Policy respectfully requests that this Court grant the petition for certiorari and strike down the offending law as unconstitutional.

Respectfully submitted,

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MAY 31 1978

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1625

IMAGE CARRIER CORPORATION,
HOUSE OF LITHOGRAPHY, INC.,
ASSOCIATED LITHO AND LETTERING
SERVICE, INC.,

Petitioners,

v.

EDWARD I. KOCH,
MAYOR OF NEW YORK CITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The National Association of Manufacturers hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* in this case. Consent was sought from all parties. The Mayor of New York City, *et. al.*, respondents, and the petitioners gave their permission. The intervenors below did not. All of these documents have been filed with the clerk.

The National Association of Manufacturers (NAM) is a non-profit voluntary business association, organized as a membership corporation under the laws of the State of New York. It is composed of over 12,500 manufacturing and related concerns, eighty percent of which have 500 or fewer employees, located throughout the United States. The NAM, therefore, represents a substantial number of the nation's industrial employers who employ, in the aggregate, over 15 million employees or roughly seventy-eight percent of all employees employed in manufacturing nationwide. Furthermore, a significant number of NAM's members, many of whom look to government contracting work for necessary income, maintain business operations which are predominantly non-union.

NAM is firmly committed to the principle that every employee and prospective employee should be guaranteed freedom, without intimidation or coercion from any source, to join or not join a labor organization and to maintain or discontinue his membership and participation in its activities. The Second Circuit Court of Appeals'* approval of New York City's restrictive bidding and contracting policy represents a direct threat to the continued viability of this principle because it seriously undermines the freedom of choice which should be available to all employees with respect to their decision to join, *or refrain from joining*, a union.

Both fairness and law dictate that government play a neutral role in this decision-making process. A public policy which penalizes non-union employers and employees by arbitrarily discriminating between union and non-union employers in the awarding of government contracts all but destroys this neutrality by unfairly and unjustifiably tipping the balance in favor of unionization. While there may well be a legitimate federal and state interest in fostering collective

*The decision below is reported at 567 F.2d 1197.

bargaining, the promotion of that interest must necessarily await the exercise of a free choice by the relevant parties. Because this nation's labor laws guarantee the exercise of such a choice free from inappropriate governmental intervention, the decision below is contrary to national labor policy.

Just as importantly, nothing contained in the decision below in any way limits its applicability to either the printing industry or to New York City. In large part the court below justifies its affirmance of New York City's restrictive policy on the notion that such a requirement does indeed foster collective bargaining. Should the decision below remain intact, then little would stand in the way of an endless proliferation of similar requirements in other localities and for other industries. We need not dwell on the decidedly adverse effects these requirements would have on non-union manufacturers who hope to perform government work in such jurisdictions. For many, their continued economic viability may be in serious jeopardy.

Based on the foregoing, we submit that NAM quite clearly has a vital interest in the outcome of the instant litigation. Furthermore, we believe the views of NAM, its experience with the critical issues involved herein, and its general business expertise may be of assistance to this Court.

Accordingly the NAM urges that leave be granted to file the accompanying brief as *amicus curiae* and respectfully so moves this Court.

Respectfully submitted,

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OF THE UNITED STATES OF AMERICA

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interest of the National Association of Manufacturers in this case is set forth in the foregoing Motion for Leave to File Brief Amicus Curiae.

REASONS FOR GRANTING THE WRIT

The decision below in essence holds that a local governmental authority may lawfully restrict the acceptance of bids for and the awarding of government contracts to unionized employers. The Second Circuit's decision thus

raises important questions concerning the extent to which public bodies may interfere with the otherwise free exercise of rights protected by our national labor policy. Of equal import are the questions raised by this decision relative to the proper scope and applicability of protections against state action afforded by the Fourteenth Amendment to the United States Constitution. Because of the importance of these questions to the identification of the proper role to be played by local government in federally regulated areas of labor management relations, and because of the potentially far reaching impact of the decision below, we submit that a resolution by this Court of the significant issues raised herein is both warranted and necessary.

I. The Decision of The Second Circuit Is At Variance With This Court's Pronouncements Concerning The Scope Of The Federal Labor Law Pre-Emption Doctrine

In upholding Respondent's restrictive contracting practices, the Second Circuit paid little attention to those decisions of this Court which define the scope and force of the Federal Labor Law Pre-Emption doctrine. Not surprisingly, therefore, the decision below ignores the fundamental tenet of the doctrine which this Court has unequivocally applied.

> The National Labor Relations Act is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce. As such, it is of course the law of the land which no state law can modify or repeal. *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967).

This Court has held that if the conduct under analysis is neither protected nor prohibited by the National Labor Relations Act, *as amended* (hereinafter "NLRA") 29 U.S.C. §§141 et seq., the question becomes whether

"Congress has occupied the field and closed it to State regulation." *Teamsters Local 20 v. Morton*, 377 U.S. 252, 258, (1964). The absence of specific legislative enactments on every conceivable labor relations issue does not serve as a Congressional invitation to the States to regulate any particular aspect of the field. If the area as a whole requires uniformity, Congressional silence may be indicative of an intent to leave that particular aspect to the control of "the free-play of economic forces." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

The Respondents' restrictive contracting practices[1] directly infringe upon an employee's federally protected right to freely choose between union representation and remaining non-union.[2] The entire scheme of the NLRA is designed to insulate this decision-making process from unwarranted intrusions by labor or management and, although not specifically stated, it must necessarily follow that governmental bodies are likewise precluded from interfering with an employee's exercise of this right. *Cf. Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 149-150 (1976). Federal labor policy does not and should not favor governmentally induced unionism.

---

[1]The restrictive Mayoral Order is set forth in relevant part at page 4 of the Petition For A Writ of Certiorari.

[2]Section 7 of the NLRA (29 U.S.C. §157) provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. (Emphasis added.)

By restricting the award of municipal printing contracts to shops which are authorized to display the union label, the Mayoral Order denies the employees of open shops the opportunity to work on city printing projects. This blatant intrusion upon an employee's fundamental right to reject unionization finds no approval in either the NLRA or in legislative history. Had the Mayoral Order made non-union status a condition for bidding on and performing city printing contracts, the arguments against such a requirement would be equally compelling. But the Second Circuit's decision all but ignores this irreconcilable conflict between the Mayoral Order and the Section 7 rights of employees.

Rather, the court below sought to minimize the impact of New York City's restrictive policy on employees' Section 7 rights by pointing out that neither the City's resolution nor its policy memoranda and bidding instructions implementing the Mayoral Order require any employee to join a union, and that the City's policy merely "prefers" union shops to non-union shops. While it is true that the literal wording of the order does not command all printing employees to join unions, to characterize the City's policy as merely a "preference" is to dramatically understate its practical impact. Quite clearly the City's policy operates as a blanket exclusion of open shop employers from the municipal contracting process thereby depriving non-union employers and employees alike of the benefits which might otherwise naturally flow from such contracts. Contrary to the apparent belief of the court below, we submit that there is a significant difference between preferential treatment and a blanket exclusion, and the lower court's failure to so recognize represents nothing more than an elevation of form over substance.[3]

[3]The Second Circuit found further support for its conclusion in its finding that the City's flat-form printing needs are not substantial enough to have even an *indirect coercive effect* on the exercise of Section 7 rights by employees. The error in this analysis is, of course, that it

Furthermore, it should not escape this Court's attention that the restrictive contracting practices also have a chilling effect upon the employees' right to decertify their bargaining representative pursuant to Section 9(c)(1)(A)(ii), (29 U.S.C. §159(c)(1)(A)(ii)) of the NLRA. The prospect that work previously awarded to their employer may be withdrawn or that otherwise available contracts could be withheld should a successful decertification be accomplished is a sobering consideration, especially where the loss of a contract could mean the loss of their jobs.

Since the Mayoral Order has a "direct tendency to frustrate the purpose of Congress", *Nash v. Florida Industrial Commission, supra,* at 239, and "creates a substantial risk of conflict with policies central to the federal labor law", *Connell Construction Co., Inc., v. Plumbers & Steamfitters Local 100,* 421 U.S. 616, 636 (1975), such governmental action should not be countenanced by this Court.

II. The Decision Below Conflicts With This Court's Decisions Delineating The Basis Upon Which A Local Municipality May Exercise Its Police Power.

This Court has consistently held that in the area of economic regulations, local government enactments must bear a rational relationship to a legitimate governmental objective in order to be a constitutionally valid exercise of police power. Since all laws passed to promote the general

makes the pre-emption determination turn on the irrelevant consideration of how much printing work is available. Moreover, such a conclusion tacitly recognizes that the City's policy may indeed represent a coercive factor. Finally, we view this conclusion as being irreconcilable with the lower court's earlier conclusion that petitioners had demonstrated sufficient "injury in fact" to have standing in the instant case. 567 F.2d 1201.

welfare discriminate to a certain degree, it is only those that discriminate on an arbitrary basis which the Equal Protection Clause prohibits. In this regard, States are granted wide latitude in legislation which regulates economic matters. *Royster Guano Company v. Virginia*, 253 U.S. 412 (1920); *Reed v. Reed*, 404 U.S. 71 (1971); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Despite the broad discretion granted to states in this area, and the presumption of validity such legislative acts enjoy, those which are wholly without rational nexus to a legitimate governmental objective are repugnant to the Equal Protection Clause of the Fourteenth Amendment. We submit that the union label requirement does nothing to further any legitimate governmental interest.

The Mayoral Order of 1934 was an *executive* pronouncement, unaccompanied by any of the procedural safeguards which normally support legislative enactments, such as findings of fact indicating the need for such a policy or the salutary effect such a policy would have. The sole and limited function of the Mayoral Order of 1934 was:

> . . . to lend the greatest measure of aid and assistance during the present economic Depression to those citizens of our City engaged in the various branches of the printing industry . . .

From this brief statement of intent contained in the Resolution's preamble, the Second Circuit was able to infer a comprehensive scheme to foster collective bargaining identical to that of the New York State Labor Relations Act, §§700 *et seq.* (McKinney, 1977). However, since the Mayoral Order preceded both of these Acts, the Court's *ex post facto* explanation is not persuasive.[4]

[4]The lower court concedes the absence of this purpose from the explicit language of the Order itself by stating: "At least, that is what we read into the preamble of the Resolution . . . ." 567 F.2d at 1203.

Moreover, the lower court's analysis in this regard completely misses the mark because it necessarily assumes that if the Mayoral Order would have passed constitutional muster at the time of its passage in 1934 then it is also valid now. In any constitutional analysis, however, it is axiomatic that due regard must be given to contemporary circumstances and conditions. Were this not the case, then the "separate but equal" doctrine announced by the Supreme Court in *Plessy v. Ferguson* 163 U.S. 537 (1896) would still be the law of the land. The Supreme Court recognized that constitutional law is evolutionary rather than static in *Brown v. Board of Education*, 347 U.S. 483 (1954) wherein it stated:

> In approaching this problem, we cannot turn the clock back to 1968 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the nation. *Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the law.* (Emphasis added) 347 U.S., at 492-493.

Gauged against contemporary standards, the Second Circuit's opinion must fall by force of its own terms. The lower court implicitly acknowledges the likely absence of a rational basis to support the Mayoral Order when it stated:

> Perhaps, as a matter of policy, favoring unionized employers should be reexamined by the responsible authorities, now that both the quality of printing and the wages paid may be roughly equivalent. (Citations omitted) 567 F.2d at 1203.

Thus, not only did the Second Circuit analyze this case against antiquated standards, but the decision on its face

clearly suggests the absence of any basis upon which to support the City's policy. Accordingly, we submit that the lower court's conclusion is patently erroneous. *See Abie State Bank v. Bryan*, 282 U.S. 765 (1931).

III. Both Federal and State Courts Have Questioned the Legality of Public Contracting Practices Restricting The Award of Public Contracts To Only Unionized Firms.

The issues involved in this case have received a great deal of attention from both Federal and State courts, many of which have raised questions as to the legality of restricting public contract bidding to unionized firms. *See, e.g., Master Printers Association v. Board of Trustees of Junior College District No. 508*, 356 F. Supp. 1355 (N.D. Ill. 1973) and cases cited therein.

For example, the lack of any justifiable rationale for distinguishing between an open shop and a unionized employer's shop in awarding public contracts was recognized in *Anthony P. Miller, Inc., v. Wilmington Housing Authority*, 165 F. Supp. 275 (D. Del. 1958). In this case, the plaintiff asserted that the City of Wilmington had the duty to let contracts solely to union labor in order to insure tranquility among various contractors working on the job. The court responded that such a policy would be in violation of public policy and found:

> [B]y the full weight of authority, a municipal corporation cannot discriminate in favor of organized labor. 165 F. Supp. at 275.

The Court also concluded that a local government has the duty to deal fairly with all its citizens:

> Government exists for the benefit of all. All are required to pay for the benefits of government, and finally, government has responsibility to all of the inhabitants alike. These appear to be the three main reasons assigned by the cases for almost uniformly holding invalid statutes directing the employment of union labor in connection with public works contracts. 165 F.Supp. at 280 (quoting *Teller on Labor Disputes and Collective Bargaining*, Volume 1, Section 171 at 516.)

As indicated in *Master Printers Association, supra*, there is a considerable body of state court case law holding union label policies on the part of municipalities unconstitutional. Additionally, numerous courts have held that to restrict the award of public contracts to unionized firms creates a monopoly among those firms which is both violative of the principles of competitive bidding, and repugnant to sound fiscal policy. *See, e.g., Mugford v. Mayor and City Council of Baltimore*, 185 Md. 266, 44 A.2d 745 (1946).

We find the restrictive policy involved in the case at bar as offensive to the principles announced in the above-noted cases as the requirements and assertions with which those courts were dealing. Thus, we submit that as a matter of policy, logic and law, the decision below should not be permitted to stand.

IV. The Second Circuit Has Placed Its Imprimatur On A Policy Which Fosters Anticompetitive Activity

Application of the Mayoral Order restricts the award of the City's printing contracts to a small fraction of its eligible bidders, namely, those whose employees have organized. Awards of municipal contracts on this arbitrary basis are in complete derogation of sound fiscal policy, and have the anomalous result of creating a monopoly among the City's unionized printing shops. Thus, although not raised below, we believe it is appropriate to note that the result reached below may well stand in direct conflict with a

decision handed down by this Court subsequent to the Second Circuit's decision in the case at bar.

In *City of Lafayette v. Louisiana Power and Light Co.*, 46 U.S.L.W. 4265 (March 29, 1978), this Court made clear that such artificial restraints on trade enjoy no exemption from the application of the federal antitrust laws. There it was held that apart from the *Parker v. Brown* 317 U.S. 338 (1943) "state action" exemption available to them as state agencies, cities are not excluded from the coverage of this country's antitrust laws. The Court stated:

> [I]f municipalities were free to make economic choices counseled solely by their own parochial interest and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protections would be introduced at odds with the comprehensive national policy Congress established. 46 U.S.L.W., at 4270.

In the case at bar, the facts indicate that the restrictive bidding policy of the City of New York was promulgated by fiat of Mayor Fiorello LaGuardia dated April 12, 1934; over the years, the policy was subsequently adopted by other city bureaucracies. The wholesale exclusion of an entire segment of an industry from the bidding process has, we submit, obvious anticompetitive effects on those excluded. Nevertheless, this union label policy was not promulgated by the municipality pursuant to a legislative mandate of the State. Thus, it would appear that under the decision in *City of Lafayette, supra,* the union label policy of the City of New York may constitute anticompetitive activity within the reach of the Sherman Act, 15 U.S.C. §§1 *et seq.*

CONCLUSION

For the foregoing reasons, and for the reasons set forth by Petitioners, this Court is respectfully requested to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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